

# CASES

ARGUED AND DETERMINED

IN

## THE SUPREME COURT

OF

THE STATE OF MISSOURI.

MARCH TERM, 1874, AT ST. LOUIS.

NELSON KINGMAN AND MARY U. KINGMAN, Respondents, *vs.*  
WILLIAM H. ABINGTON AND ARCHIE HATCHETT, Appellants.

1. *Landlord and tenant—Forcible entry and detainer—Sale of premises—Attornment.*—Under the statutes of this State, in suit by the landlord against his tenant for forcible entry and detainer, defendant may show that plaintiff has parted with his title, as by sale under a deed of trust, provided that the tenant has attorned to the purchaser. (See *Pentz vs. Kuester*, 41 Mo., 447.)
2. *Possession of landlord after tenant's departure need not be personal.*—When a tenant leaves either at the end of the term or by surrender of the lease, the landlord comes into the sole possession of the premises although not personally present.
3. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed to set aside the order granting the appeal, and then grant a new trial.
4. *Forcible entry and detainer—Judgment for rents and profits—Joint judgment, when proper.*—Ordinarily, in proceedings under the forcible entry and detainer act, where one of the defendants comes into possession subsequently to the other, and holds it for a shorter time, a joint judgment for rents and profits would be improper. But where they are put in possession in pursuance of one general design and are acting in concert to hold the possession as agents of a third party, so as to shift the burden of proving title to the property, such judgment will not be held to be error.



# CASES

ARGUED AND DETERMINED

IN

## THE SUPREME COURT

OF

THE STATE OF MISSOURI.

MARCH TERM, 1874, AT ST. LOUIS.

NELSON KINGMAN AND MARY U. KINGMAN, Respondents, *vs.*  
WILLIAM H. ABINGTON AND ARCHIE HATCHETT, Appellants.

1. *Landlord and tenant—Forcible entry and detainer—Sale of premises—Attornment.*—Under the statutes of this State, in suit by the landlord against his tenant for forcible entry and detainer, defendant may show that plaintiff has parted with his title, as by sale under a deed of trust, provided that the tenant has attorned to the purchaser. (See *Pentz vs. Kuester*, 41 Mo., 447.)
2. *Possession of landlord after tenant's departure need not be personal.*—When a tenant leaves either at the end of the term or by surrender of the lease, the landlord comes into the sole possession of the premises although not personally present.
3. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed to set aside the order granting the appeal, and then grant a new trial.
4. *Forcible entry and detainer—Judgment for rents and profits—Joint judgment, when proper.*—Ordinarily, in proceedings under the forcible entry and detainer act, where one of the defendants comes into possession subsequently to the other, and holds it for a shorter time, a joint judgment for rents and profits would be improper. But where they are put in possession in pursuance of one general design and are acting in concert to hold the possession as agents of a third party, so as to shift the burden of proving title to the property, such judgment will not be held to be error.

---

Kingman, et al. v. Abington, et al.

---

*Appeal from St. Charles Circuit Court.*

The court refused the following instructions asked by defendant:

"The court declares the law to be, that when an appeal has been granted, the court has no further jurisdiction over the cause, and if the evidence in this cause shows that the verdict and judgment of the court in case of *Kingman & Co. vs. Abington*, rendered at its September term, 1871, has never been set aside, reversed or modified, then said judgment is still in full force and effect; and if the evidence further shows, that the subject matter in this suit is the same as in the former suit, then plaintiffs are barred by said judgment, and the verdict must be for the defendants.

*Kellar & Buckner*, for Appellants.

I. Whether O'Connor actually attorned to the grantees of the plaintiff, which he could have done, or defended himself on the ground that by the sale and deed the relation of tenant to his landlord had been extinguished, in either case his defense must have been successful. (*Pentz vs. Kuester*, 41 Mo., 447; *Taylor Landl. and Tenant*, § 629; *Smith's Landl. and Tenant*, p. 291, note and authorities there cited; 10 *Hamp.* 49; 6 *Wend.* 679; *Tilghman vs. Little*, 13 *Ill.*, 241.)

II. The court should have given the instructions asked by defendants as to the effect of the former judgment of the inferior court, between the same parties, and for the same unlawful detainer. After granting of the appeal, the Circuit Court lost jurisdiction of the parties and the cause for every purpose. (*Ladd vs. Cousins*, 35 Mo., 513; *Stewart vs. Stringer*, 41 Mo., 403.)

*Lackland & Broadhead*, for Respondents.

VORIES, Judge, delivered the opinion of the court.

This was an action for unlawful detainer brought under the 3rd section of the statute of Forcible Entry and Detainer. (*Wagn. Stat.*, 642.) The plaintiff, Mary U. Kingman, was a

---

Kingman, et al. v. Abington, et al.

---

resident of the State of Indiana prior to her marriage with Nelson Kingman, and was the owner and in possession by her agent of a certain house and lot of land described in the complaint, situate in the town of Millville in the County of St. Charles. The land was leased or rented by her agent to one Jerry O'Connor. The time for which O'Connor had leased the lot expired, and he was notified by the agent of the plaintiffs at Millville to vacate said house and lot, and deliver up the possession in order that the house might be repaired for the use and occupancy of the plaintiff. O'Connor, in conformity to said notice and request, did remove from said house and premises. Immediately after O'Connor had vacated the premises, or at least on the next day thereafter, one William J. McElheny who claimed to have obtained title to the premises by virtue of a sale under a deed of trust, executed by said plaintiff Mary before her marriage with Kingman, without the consent of said plaintiff or her agent, but against their will, took possession of the premises by putting one Wray and Keys in the house who remained there for a short time, when defendant Abington was put in possession of the premises, and sometime afterwards, defendant Hatchett was also put into possession by the said McElheny. Each and all of these parties were put into and held the possession as the agents of McElheny. Neither of them were to pay any rent, but went into the possession merely to hold the possession and take care of the premises for McElheny, with the agreement and understanding with McElheny, that if they were sued for the possession or otherwise put to costs, &c., he was to save them harmless from all damages.

The plaintiff, Mary U. May, before her marriage with Kingman, on or about the 20th of August, 1870, demanded the possession of the premises in writing of the defendants; which demand was made before the commencement of the suit. Another demand was made by Nelson Kingman and said Mary after their marriage in March, 1872, which was also before the commencement of the suit. There was evidence tending to prove that Hatchett held possession by the permis-

sion of James Goff and Erastus Wells, and that there was an understanding between McElheny, Goff and Wells; that this suit and the suit of May vs. Lockett grew out of the same transaction of McElheny vs. May, and that they were all connected, and that the property had been bought for McElheny, and that McElheny was the real party interested and that there was some kind of an arrangement between McElheny, Goff and Wells about the matter, and that it was McElheny's attorney who put Hatchett in possession or authorized him to go into the possession. It was charged in the complaint filed in this case, that the defendants, while the plaintiffs were in the possession of the premises, wrongfully and illegally entered upon the premises against the will of plaintiffs, and wrongfully and without force by disseizin obtained and continued in the possession, and detained the same after the demand made in writing, &c. On the trial of this case in the Circuit Court, where the same had been taken by appeal, the defendants offered in evidence a deed of trust purporting to have been executed by the plaintiff Mary U. May, before her marriage with Kingman, and which purported to convey the premises in question to one Oglesby, as trustee, with power to sell the land on certain conditions, and for certain purposes therein named; and also a deed from the sheriff of St. Louis county to James Goff and Erastus Wells, which purported to have been made under the power given in said deed of trust. These deeds were severally objected to by the plaintiffs, on the ground that they were immaterial; that they were title papers only tending to prove title in a stranger, which could not be inquired into in this case. The court sustained the objection and excluded the deeds and the defendant excepted.

The defendants also offered in evidence a transcript of proceedings and a judgment rendered by a justice of the peace in the case of Kingman and wife vs. Abington, and the record of the same case, when it had been taken and tried in the Circuit Court by appeal, and the papers filed in said cause, and parol evidence to prove that the subject matter in that

case was identical with the subject matter of this case. It was admitted that the subject matters in controversy in both cases was the same, and that the suit in the former case had been dismissed before judgment, and before commencement of this suit. The plaintiffs objected to the admission in evidence of said transcript and records so offered, because said evidence was irrelevant and immaterial. The evidence was excluded by the court and the defendant excepted.

The court, at the close of the evidence, at the request of the plaintiffs gave several instructions, and refused several asked for by the defendants. To the giving of said instructions, and to the refusing of those asked by the defendant, the defendant at the time excepted. After a verdict and judgment in favor of the plaintiffs, the defendants filed their several motions for a new trial and in arrest of judgment, assigning all of the usual grounds for said motions. These motions being severally overruled by the court, the defendants saved their several exceptions thereto and appealed to this court.

The principal questions presented in this court are as to the propriety of the rulings of the court below in excluding from the evidence in the case the deed of trust and trustee's deed offered in evidence by the defendant, and in excluding the transcripts of the judgment and proceedings had before the justice of the peace and in the Circuit Ct. in the case between Kingman and wife and Abington; and also in rendering a joint judgment against both of the defendants for the rent and profits of the premises during the whole time that they were detained from the plaintiffs, although one of the defendants had only been in possession for a portion of the time.

Exceptions were also taken to the rulings of the court in giving and refusing instructions; but if the court properly excluded the evidence referred to, then the instructions refused being predicated on the excluded evidence were properly refused, and those given were substantially correct, and therefore it will not be necessary to further refer to the instructions.

It is insisted by the defendants, that the deed of trust and

trustee's deed ought to have been admitted in evidence, to show that the relation of landlord and tenant as to the property in question had been dissolved and extinguished by the act of the landlord. This might have been, and would have been true, if the tenant had attorned to the purchaser under the deed of trust, and the suit had been against the tenant; but in this case the tenant had not attorned, but had remained until his term had entirely expired, and gave up and vacated the property. The agent of the plaintiffs was there ready to take the possession of the property. O'Connor, the tenant, had been paying the agent rent up to the very day that he yielded the possession, and the agent was there the next day to take charge of the property, when he found that the possession had been taken by Abington and those acting in concert with him. It is true, that there is some evidence that tends to show that the wife of O'Connor (the tenant), had given her consent to Abington's entry, but the whole evidence taken together shows that this was a mere subterfuge. The tenant's time was out; the plaintiff's agent who had been receiving the rent and who had charge of the premises was there to take charge of the property; the tenant's lease had terminated; he had surrendered to the landlord; and although the agent was not present at the very moment that the tenant vacated the house, he was in contemplation of law in the actual possession, and the entry of defendants was unlawful and just such an entry as the law of forcible entry and detainer was intended to prevent. The facts of this case in every material feature are identical with the case of *May vs. Luckett*, 48 Mo., 482, and for the reasons given in that case, these deeds were properly excluded. This case is not different as it now stands, from what it would be, if the purchaser under the deed of trust had purchased while the plaintiffs were in the actual occupancy of the house, holding the actual possession of the lot, and the defendants had, against their consent, taken possession of the premises while the plaintiffs were temporarily from home for a few hours.

The next question is, as to the exclusion of the transcripts



---

Kingman, et al. v. Abington, et al.

---

and records and judgments from the justice's court and the Circuit Court in the same case on appeal. This court at the present term has decided that the Circuit Court has the right, at the same term at which an appeal is allowed, to set aside the order granting the appeal and then grant a new trial to the parties on their application. The record offered in evidence in this case, showed that the appeal had been set aside and a new trial granted, and it was admitted that the suit was then dismissed. Hence, it cannot be seen for what purpose the record could have been offered in evidence or what materiality there was in the evidence if it had been admitted. The evidence was therefore properly excluded.

The next ground of objection made by the defendants is, that the judgment for rents and profits was improperly rendered jointly against Abington and Hatchett, when Hatchett had only occupied the premises for a part of the time, and came into the possession long after Abington had been holding the possession of the premises. A joint judgment would ordinarily be improper under such circumstances; but in this case each and all of the parties who were in possession of this lot and house, seem to have been put into and to have taken the possession in pursuance of one general design; that they were all acting in concert to effect the same object, which was to hold the possession of the land for McElheny as his agents, so as to transfer the burden of proving title to the plaintiffs in this case, in place of a resort to an action of ejectment, as the law contemplates, by McElheny. He took this plan to force the plaintiffs to sue, and the defendants went into possession, without paying any rent to McElheny but for the mere purpose of keeping the plaintiff out of possession, under an arrangement that McElheny should save them all harmless. These defendants acted in concert to accomplish a common purpose; they acted together and defended the suit together, and ought to be responsible for each other's acts. There were some other minor points raised in the case, but it is not thought that they have any bearing on its merits.

Judges Adams and Wagner are absent; the other judges concurring, the judgment is affirmed.

MISSOURI LOAN BANK, Respondent, *vs.* JOHN HOW AND GILES F. FILLEY, Appellants.

1. *Corporations—Mo. Ben. & Loan Ass'n—Loans by—Pledge of goods and chattels, etc.*—Under its charter (Sess. Acts 1865, p. 252), the Missouri Benevolent and Loan Association had authority to make loans upon personal security without, joining therewith the pledge of goods and chattels as further security for the re-payment of the money loaned.

*Appeal from St. Louis Circuit Court.*

*Glover & Shepley and W. C. Jones and J. D. Johnson*  
for Appellants.

*C. M. Napton*, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought on a negotiable promissory note which is charged to have been executed by the defendant, How, for the payment to defendant, Filley, of the sum of four thousand dollars, ninety days after date, and which was, before the maturity thereof, indorsed and transferred by said Filley to plaintiff for value.

The action is against the maker and indorser, and the petition is in the usual form.

The defendant, Giles F. Filley, by way of defense to the action, states in his answer to the petition, that by the charter of plaintiff's corporation, the plaintiff has no power to loan money except upon personal security and the pledge of goods and chattels; that the note sued on was made for no other or further consideration than the loan of four thousand dollars by the plaintiff to the defendant, John How, and that defendant, Filley, received no part of the consideration for which the note was executed, but only indorsed said note for the accommodation of said How, and for no other consideration whatever; that said loan was made by plaintiffs without any pledge of goods or chattels to secure the same, and that said loan was contrary to the charter of said corporation, and without any legal power or authority to make the same, and that said contract and promissory note were and are illegal and void.



The plaintiff demurred to the answer on the ground that it does not state facts sufficient to constitute a defense to the action, and that the answer assumes an incorrect construction of the charter of plaintiff, and that, if the construction was right, it is no defense to the action.

This demurrer was sustained by the St. Louis Circuit Court at Special Term.

It was agreed on the hearing of the demurrer, by the parties to the action, that the charter of the plaintiff is contained in the "Act to establish the Missouri Benevolent and Loan Association," approved February 20th, 1865 (Sess. Acts of 1865, page 252), and that the name of said corporation was changed to that of "The Missouri Loan Bank," and that said charter should be considered as a part of the plaintiff's petition as fully as if the same were set forth therein; and the same was so considered by the court in considering and passing on the demurrer to the defendant's answers.

The defendant at the time excepted to the action of the court in sustaining said demurrer.

The defendant declining further to answer the petition, final judgment was rendered in favor of plaintiff for the amount of the note with legal interest. From this judgment the defendant appealed to the general term of the St. Louis Circuit Court, where the judgment rendered at special term was in all things affirmed: and from this judgment the defendant, Filley, appealed to this court.

It is insisted by the defendant, that the plaintiff by virtue of its charter only had a limited power to loan money, and that all contracts for the loan of money attempted to be made by the plaintiff, where not made in the particular manner designated in the charter, were unauthorized and void, and that the contract of loan for which the note sued on was executed, not having been secured by a pledge of goods and chattels, was and is therefore unauthorized and void.

It is provided by the first section of the act or charter incorporating plaintiff, that "the association hereby created shall have the power to loan money upon personal security and the

pledge of goods and chattels, by such agencies and established offices as the public business and requirements demand, subject to the restrictions and limitations in this act prescribed."

The second section provides that, "all loans by this association or its agencies shall be for a period of time not exceeding one year, the time to be at the choice of the person borrowing. Books shall be kept in which shall be entered the name of the borrower, amount of the loan, the time and terms of such loan and a description of the property pledged therefor. Whenever a sale shall take place of any pledged property, the same shall be entered on the books with the amount of the sale and costs and expenses of the same, showing in a clear and satisfactory manner the transactions, and the overplus if any, and such overplus shall be retained for one year and paid to the party borrowing, or his or her legal representatives. And if not demanded within that period, shall be carried to profit and loss, to be disposed of as hereinafter provided, unless the association may, in special cases, make any proper order to pay the same over to the borrower."

The 4th section provides that, "the amount of interest on loans shall not exceed eighteen per cent. per annum, to be disposed of as follows, viz: If the interest reaches eighteen per cent. after deducting the amount of costs and expenses attending the transaction, two per cent. shall be set apart, and if it reaches fifteen per cent. per annum after such deduction, one per cent. thereof shall be set apart, and the amount of such deductions shall be paid into the State Treasury on the first of January of each year for the support of the indigent insane at Fulton and St. Louis City Hospital, in equal parts. And one-half of the overplus as mentioned in the second section of this act, shall at the end of every period of five years, be paid into the State Treasury for the same purposes," &c.

The 5th section provides, that the corporation created shall be exempt from the operation of the 4th, 18th and 20th sections of the general act of corporation, approved November, 23d, 1855.

The 10th section requires the corporation and all of its agencies to pay into the State Treasury in semi-annual payments, one per cent. per annum of all its net earnings for the use and benefit of the Soldiers' Orphan's Home Fund.

The first, and I think the only question necessary to be considered by this court is, whether the plaintiff, by virtue of its charter, has the power or authority to make loans of money upon personal security, without joining therewith the pledge of goods and chattels as further security for the payment of the money loaned? While it is admitted that corporations have no powers but such as are specifically granted or such as are necessary, by fair intendment, to the complete exercise and enjoyment of the powers granted by their charters, yet we cannot say that the plaintiff under its charter had no power to loan money upon personal security. It is true, that where the language used by the legislature is plain, admitting of but one construction, and the natural and usual construction of the language used is consistent with the scope and object of the whole act, the natural and usual construction of the language ought to prevail. The language conferring power on this corporation to loan money is, that "The Association hereby created shall have power to loan money upon personal security and the pledge of goods and chattels." I think that the most natural construction of this language is, when we take into consideration the objects and purposes of the creation of the corporation, that the association shall have power to loan money upon personal security, and shall have power to loan money upon the pledge of goods and chattels. It certainly could not have been intended by the Legislature that a loan of money upon personal security should be void, but that if the personal security given for the sum of ten thousand dollars should be accompanied with the pledge of ten cents' worth of goods and chattels, the loan would thereby become valid.

It is, however, contended by the defendant that the second section of the charter is entirely inconsistent with the idea that the corporation should have power to loan money on personal security only; that said section provides that all loans shall be

for a period of time not exceeding one year, the time being at the choice of the person borrowing; that books shall be kept in which shall be entered the name of the borrower, amount of the loan, the time and terms of the loan, and a description of the property pledged. It is asked how a description of the property pledged could be given if none was pledged? The fair construction of this section is, that a fair and full account of each transaction shall be entered on the books of the Company, and if we refer to the fourth section of the act we will readily see the object of the legislature in requiring these transactions to be truly and fully entered on the books. It is there provided, that when the interest on loans reach eighteen per cent. after deducting the amount of costs and expenses attending the transaction, two per cent. shall be set apart, and if it should reach fifteen per cent. per annum, one per cent. thereof shall be set apart, and the said amounts so set apart, shall be paid into the State Treasury for the support of the indigent insane of Fulton and St. Louis City Hospital in equal parts, and that if there is any overplus left, as is mentioned in the second section of the act, from the sale of property pledged, one-half shall be paid into the State Treasury for the uses aforesaid. And it is further provided by the tenth section of the act, that one per cent. of the entire net earnings of the Company shall be paid into the State Treasury for the use of the Soldiers-Orphan's Home Fund. When these provisions of the charter are taken into consideration, the reason for requiring all transactions to be fully entered in the books to be kept by the Company becomes apparent. The object in requiring these entries to be made in all cases of a loan was to insure a full and complete history of the transaction to be entered, and that in all cases where personal property was pledged, a description of the property should be given.

It is further contended by the defendant, that the legislature never could have intended to authorize this Company to loan money at 18 per cent. on mere personal security like other banking institutions in the State, and to charge eighteen

per cent. interest thereon, while all other banks in the State were limited to a much less amount of interest; that it would be unjust to other banks to give this institution that advantage. This objection is also answered by the provisions in sections four and ten above referred to. This corporation was required to keep an account of every transaction for the purpose of ascertaining the per cent. which it was bound to pay into the State Treasury of its entire earnings. And no matter how much or how little was made, it was bound to pay into the State Treasury one per cent. of its net earnings, and if it should make as much as eighteen per cent. on its loans, at least three per cent. was to be paid into the Treasury of the State. So that it appears that it was anticipated by the legislature that part of the profits of the institution would be paid into the State Treasury, and however delusive the idea might be, that the corporation would loan money for eighteen per cent. merely for the purpose of paying two per cent. thereof into the State Treasury, it operated as one of the incentives to induce the Legislature to grant extraordinary privileges to this institution. I do not, therefore, think that the privilege given to this institution to charge eighteen per cent. on loans, under the circumstances, was at all inconsistent with the construction given to the charter by the Circuit Court.

The language of the charter is that the corporation shall have power to loan money upon personal security, and the pledge of goods and chattels. Now it is well understood that the word "goods" in its ordinary acceptation, does not include everything comprehended in the more general word "chattels;" but I suppose that no one would contend that the words "goods and chattels," as used in the charter of plaintiff, would restrict the plaintiff to such loans as were secured by the pledge of chattels with which some articles or chattels should be combined, coming within the usual meaning or designation of "goods." The word "and" as used in that case, must have the same meaning as the word "or;" and the phrase would be construed exactly the same way, no matter which of the words, "and" or "or," was used.

While I agree, that the powers given to a corporation should be strictly construed so as to effect the objects of its creation, yet the construction must not be so strict or technical as to defeat the evident objects and purposes of its creation.

The case of the "North River Insurance Company vs. Lawrence, 3 Wendell, 482," so much relied on by the defendant, I do not think is in point, in considering the case under consideration. There the language giving power to make the contract then in question was, "and also to make loans of the capital stock funds or monies on bonds and mortgages."

The plain meaning, as well as the general and common understanding of the terms, as used in that case, was that the power conferred, was to loan money on bonds secured by mortgage on property. The court did right in construing the language in conformity with ordinary meaning. It must also be taken into consideration that in the charter of the corporation being considered in that case, the corporation was expressly prohibited from using or employing any part of its stock or funds in buying or selling any goods or merchandise, or in purchasing or discounting of any bill, bond, note or obligation whatever, or performing any other banking operation. Those prohibitory words in the charter, when taken in connection with the words authorizing the loan on bonds and mortgages, precluded any other construction of the charter than that given by the court, and the same thing may be said in reference to other decisions referred to. In the case which we are now considering, it will be seen that by the 5th section of the charter of the plaintiff, the plaintiff is exempted from the operation of the 4th, 18th, and 20th sections of the General Act of Incorporation of 1855.

The fourth section of the general act from which plaintiff is exempted, provides, that "No corporation created or to be created, and not expressly incorporated for banking purposes, shall by any implication or construction, be deemed to possess the power of discounting notes, bills, or evidences of debt."

The legislature must have had some object in repealing this fourth section of the general statute so far as its applica-



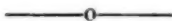
---

Tyler v. City of St. Louis, et al.

---

bility to the plaintiff is concerned, and this must be taken into consideration when construing other parts of the charter of the plaintiff. Taking all things into consideration we think the judgment of the Circuit Court is right. With the view already taken of this case, it becomes unnecessary to pass upon the question of estoppel and other questions raised upon the argument of the case.

The judgment of the Circuit Court will be affirmed. Judge Napton having been of counsel in the case did not sit; Judge Sherwood absent, the other judges concur.



MARY L. TYLER, Defendant in Error, *vs.* THE CITY OF ST. LOUIS, *et al.*, Plaintiffs in Error.

1. *St. Louis, City of—Land Commissioner—Assessments must not exceed benefits.*  
—Section 3, Art. VIII, of the Act of 1870, revising the Charter of the City of St. Louis (Sess. Acts, 1870, p. 478), provides that the Land Commissioner's jury shall assess property of owners, adjoining land condemned for street openings, "in proportion that such property may be respectively benefited by the proposed improvement." Under that section, an instruction to the jury that they are bound to find a verdict, for the amount of damages although they may be of the opinion that the sums to be assessed against adjoining land-owners therefor, may be in excess of the actual benefits derived by the property, is manifest error. Under such instruction, private property may be taken without just compensation in the way of benefits.

*Error to St. Louis Circuit Court.*

E. P. McCarty City Counsellor, for Plaintiffs in Error.

The requirement that the assessment shall be made "according to the value of the property to be assessed, and in proportion that such property may be benefited by the proposed improvement" (Sess. Acts, 1870, p. 478, § 3), was not intended to regulate and limit the assessment upon a given piece of property by the actual benefit it may have received. The word "proportion" was not used in the sense of "equal." Under that section, the assessment is to be according to the

value of the property assessed, and the proportion or ratio which each piece bears to the whole amount assessed, be it more or less than the actual benefit it will derive from the improvement.

*Hitchcock & Lubke, and Player*, for Defendant in Error.

Under § 3, of the Revised Charter (Sess. Acts, 1870, p. 478,) the jurisdiction of the Land Commissioner's jury to make assessments, is limited by the amount of benefits. Hence, the assessment beyond them was *ultra vires*, and void.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding by injunction against the City of St. Louis, its Land Commissioner and City Marshal, to restrain the sale of certain real estate of the plaintiff, under an execution for alleged benefits adjudged against her, in the opening of Branch Street. A temporary injunction was granted by the court below at Special Term, and upon a return of the summons the defendant filed a demurrer to the petition, alleging as ground of the demurrer "that the facts therein stated are not sufficient to constitute a cause of action against the defendants; that there is no allegation that plaintiff was not notified of said proceedings of said Land Commissioner." This demurrer was overruled, and defendants then declined to plead further; whereupon a final decree and perpetual injunction were entered for plaintiff. After a motion for a rehearing had been made and overruled, the case was taken to General Term, where the judgment was affirmed and the defendant sued out a writ of error.

The petition alleged that the plaintiff was the owner of a lot of ground within the city limits, and that on the 17th of June, 1863, the City Council passed an ordinance numbered 5123, entitled an ordinance to establish and open Tyler and Branch streets, and on the 4th of June, 1864, a separate ordinance to open Branch street. By this last ordinance Branch street was established, its dimensions and boundaries fixed, and the Land Commissioner of the city was "authorized and instruc-



---

Tyler v. City of St. Louis, et al.

---

ted to cause the above mentioned Branch street to be opened according to the charter and ordinance." It was further stated in the petition, that the real estate of the plaintiff was in the vicinity of, and partly fronted upon the proposed Branch street; that under the two ordinances above mentioned, the Land Commissioner of the city in May, 1870, impaneled a jury of six persons, and proceeded to assess benefits and damages for the opening of this street, and assessed against plaintiff's property as benefits alleged to have been obtained by it, by the proposed street, \$389.00; for which sum judgment was rendered against plaintiff and her property; that this verdict was confirmed by the City Council July 8th, 1870, and on the following 6th of December, an execution was issued by the Land Commissioner for said sum against plaintiff and her property, and delivered to the marshal of the city, and by him it was levied upon plaintiff's lot of ground and a sale was advertised to be made by the marshal on the 13th of February, 1871. The injunction was asked for to restrain this sale, on the ground that the threatened sale and all prior proceedings in relation thereto, were a cloud upon plaintiff's title.

The petition also alleged and charged that the proceedings of the Land Commissioner and the city in the premises mentioned, were illegal and void for the following reasons and matters of fact, which it was averred did not appear in the record of the Land Commissioner, so that *certiorari* would not help plaintiff. First, that at no time prior to the impaneling of the jury was any effort made by the city, to agree upon the value of the property to be taken for the proposed street with the owners thereof, as the charter of the city in force at the date of the ordinances establishing the street required: Second, that before the charter was modified with respect to the necessity of such attempt at an agreement with the owners of property to be taken on the 23rd of March, 1869, the Land Commissioner without the knowledge or approbation of the other parties interested in the subject, under color of § 7, Art. 8, of the city charter of March, 1867, en-

tered into an agreement with Margaret Davis and Ann G. T. Farrar, two of the persons who owned property in the line of, and adjoining, the proposed street, and the persons directly and principally benefited by its establishment, whereby in consideration that said Davis and Farrar dedicated that portion of their property falling in the line of the street, they should be, and were exempted from all further assessments for benefits to their property for the further opening of the proposed street, i. e., for its opening beyond the line of their ownership in the line of the proposed street.

It is then averred, that after the jury had ascertained the value of the property to be taken for the proposed street, and had estimated as to how the adjoining property was benefited by it, they reported to the Land Commissioner, that they could not distribute the cost equitably and justly, or in proportion to benefits sustained upon the adjoining property including that of plaintiff, unless they were permitted to include in this distribution and assessment, the lands of said Davis and Farrar; in other words, that said Davis and Farrar were benefited by the whole opening of the street in excess of the value of the property dedicated by them. Upon this report of the jury coming in, it is alleged that the Commissioner instructed them orally, "that although they might believe that the said lands of the said Davis and Farrar, had been or would be so benefited as aforesaid, by such opening, yet the said jury were not authorized to include the said property owned by the said Davis and Farrar, in making such assessment of benefits for the opening of said street beyond the limits of the land agreed to be dedicated as aforesaid; and that they, the said jury, were bound to agree upon a verdict, by assessing the cost of said land so to be taken for said street, not including that to be deducted as aforesaid against the other adjoining lands, and lands in the neighborhood, although the jury might be of the opinion that the sums thus respectively to be assessed, would be largely in excess of the actual benefit derived by the property thus assessed; that in consequence of said instruction the jury did agree and made

the assessment mentioned against the plaintiff, which it is charged is illegal and oppressive, and largely in excess of the actual benefits derived by plaintiff's property.

We do not think that there is much force in the argument that the proceedings were void, because there was no attempt to make an agreement with the owner of the property prior to taking any steps in relation to condemnation. Nor can the arrangement with Mrs. Davis and Mrs. Farrar be construed as the commencement of proceedings for that purpose. It was a private agreement between Mrs. Davis and Mrs. Farrar, and had no relation to the plaintiff in this suit, or any other property-holder affected by the opening of the new street. It is true that when the ordinance was passed, there was a provision in the city charter which required that before any property was taken or condemned for public use, an attempt should first be made to agree upon a price with the owner. But in the present case the proceedings in relation to assessment and condemnation, were all had under the charter of 1870, in which the provision above referred to was repealed. There was therefore no necessity or requirement for attempting to effect an adjustment with the plaintiff.

But the main point in the case is in reference to the instructions of the Land Commissioner to the jury, which it is alleged procured the verdict of which the plaintiff complains.

The 3rd section of Art. 8, of the charter of 1870 (Acts Add'j Sess. 1870, p. 478); limits the right to assess, against the "property benefited," \* \* \* "and in proportion that such property may be respectively benefited." The only theory on which these assessments for benefits rests is, that the enhanced value which the property derives from the improvement, is an equivalent for the burdens. But the Commissioner instructed the jury that after making the deductions above referred to, they were bound to find a verdict, although they might be of the opinion, that the sums thus respectively to be assessed would be largely in excess of the actual benefit derived by the property. The instruction abandons the idea of just compensation in the way of benefits and

---

Chouteau, et al. v. Rowse.

---

cannot be supported. The Land Commissioner and jury had only such jurisdiction as the statute conferred upon them. That jurisdiction was to make the assessment against the "property benefited," \* \* \* "and in proportion that such property may be respectively benefited." This "proportion" the law permitted them to make, and they could go no further. Hence the verdict was illegal, and the court did right in restraining its execution.

The judgment is affirmed, the other judges concurring.

—o—

CHARLES P. CHOUTEAU, *et al.*, Appellants, *vs.* EDWARD S. ROWSE, Respondent.

1. *Collector—Check received for taxes, when amounts to payment.*—Where a tax-payer has funds in bank sufficient to pay his taxes and the collector receives his check for the amount, and fails to present the check in due time at the bank and the institution afterwards fails, the collector must bear the loss. And if after receipt of the check, the collector returns the taxes delinquent, and the tax-payer is compelled to pay them with another appropriation of money, the collector becomes liable to him for the amount of the check.

*Appeal from St. Louis Circuit Court.*

*A. J. P. Garesche*, for Appellants.

*Harding & Crane*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action to recover from defendant ten thousand dollars which had been paid to him by the plaintiffs in part payment of taxes due on lands in St. Louis county, belonging to plaintiffs. The petition alleges that the defendant was the county collector of taxes for St. Louis county, and that the plaintiffs paid him ten thousand dollars in part payment of their taxes which had been assessed against them on their lands in St. Louis county, and that subsequently, they tendered the defendant as collector, the balance of the taxes due on their lands

which he refused to accept; that the defendant as collector, afterwards returned said taxes wholly delinquent without any credit for the amount paid by them, and that they were compelled to pay the whole amount of the taxes to Robert Charles the successor of defendant in office; that the defendant refuses to pay to the plaintiffs the said ten thousand dollars, or any part thereof, although duly demanded of him by plaintiffs.

The answer of defendant was a denial of the allegations of the petition.

On the trial of the case, the only evidence offered or given by plaintiffs was as follows: "That the plaintiffs constitute the firm of Charles P. Chouteau & Co.; that on the 30th of Nov., 1867, they delivered to defendant, who was the collector of taxes for the county of St. Louis, in part payment of the taxes by these plaintiffs to be paid, the sum of ten thousand dollars, by the check of plaintiffs on the banking house of Tesson, Son & Co., which sum defendant then and there accepted, in part payment of such taxes; that at the time said check was drawn and ever since, there has been in the hands of said Tesson, Son, & Co., more than sufficient funds, lawful money of the United States, to the credit of plaintiffs out of which to meet the payment thereof; that had said check been duly presented it would have been paid in such lawful money of the United States; but it was not so presented and never has been to this day, and that to this day said check remains in possession of defendant; that had said check been presented with due diligence, it would have been paid in lawful money of the United States, but was withheld from presentation by defendant and subsequently, and about a month later, the firm of Tesson, Son & Co., failed and have ever since been wholly insolvent."

"Upon the offer of this proof, defendant for the purpose of this trial admitted it as if made and given in evidence, and then demurred to the evidence, by asking of the court that upon the proof of these facts plaintiffs were not entitled to recover."

The court sustained the demurrer and thereupon the plaintiffs took a non-suit with leave to move to set the same aside. The plaintiffs in due time moved to set aside the non-suit which motion the court overruled and plaintiffs excepted and appealed to the general term, where the judgment at special term was affirmed, and the plaintiffs appealed to this court.

1. The chief point discussed by counsel is whether the check given by the plaintiffs on their bankers, in favor of the defendant, operated as a payment of their taxes *pro tanto*. It is conceded, that if the money to their credit in the bank, had been drawn out by the plaintiffs themselves and delivered to the defendant, that would have been an actual payment as the money to their credit was lawful money of the United States. But did not this check represent the funds in bank? And is it not the usual and ordinary way especially in large cities to pay debts by checks on banks? Kent in his Commentaries says: "The check is the acknowledgment of a certain sum due. It is an absolute appropriation by the drawer of so much money in the hands of his banker to the holder of the check, and there it ought to remain till called for; and unless the drawer actually suffers by such delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the drawee's failure, and he may under circumstances be deemed to have made the check his own to the discharge of the drawer." (4 Kent's Com., 549; Morrison vs. McCartney, 30 Mo., 183.)

The facts of this case show that the holder of the check, by not presenting it in due time made it his own, and must suffer the consequences of the failure of the bankers. If after thus receiving this check in payment of the taxes, the defendant returned the taxes delinquent and the plaintiffs were compelled to pay them again, that rendered him liable to them for the amount of the check, as so much money paid to him to pay their taxes and converted by him to his own use.

2. But the agreed statement, or rather the facts offered in evidence and admitted as proved, fail to establish the entire



---

Lockwood, et al. v. Lunsford.

---

case of the plaintiffs. They fall short of proving some of the material allegations in the petition without proof of which the plaintiffs could not recover. It was necessary for the plaintiffs to prove, that the defendant converted the money paid to him to his own use, by neglecting to give credit on the taxes for the amount paid, and by returning the whole of the taxes as delinquent whereby the plaintiffs were compelled to pay the sum sued for to his successor in office. These necessary facts were entirely omitted by the plaintiffs in proving their case, although they were a part of the material allegations averred in the petition and denied by the answer.

A plaintiff must prove all the material allegations in his petition which are denied by the answer, in order to recover. As that was not done in this case, the demurrer to the evidence was properly sustained.

Judgment affirmed. The other judges concur.

---

RADCLIFFE B. LOCKWOOD AND WILLIAM A. SCOTT, Defendants in Error, vs. AMOS LUNSFORD, Plaintiff in Error.

1. *Equity—Temporary injunction granted where title to property is in dispute.*—Courts of equity will not usually grant a perpetual injunction, in a case where the title to the premises is put in issue, and where from the evidence the title is in doubt; but will only grant a temporary injunction to restrain the parties until the title can be settled at law. But the Chancellor may hear evidence on this point, notwithstanding.
2. *Injunction against mining by a trespasser who is insolvent.*—It has long been settled that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted; and more particularly is this true when the trespasser is insolvent.
3. *Mining—License—Trespass.*—One engaged in mining under an agreement with the owners, which by its terms was revocable at any time at their option, holds under a mere license, and by continuing work after its revocation becomes a trespasser. (See Lunsford vs. La Motte Lead Company, 54 Mo., 426.)

*Error to Madison Circuit Court.*

W. N. Nolle and M. L. Clardy, for Plaintiff in Error.

I. The holding of defendant was a tenancy for mining, and not a pure tenancy at will. (1 Washb. R. P., 395, § 1, *et seq.* [2nd Ed.]; Kerr vs. Clark, 19 Mo., 132; Williams vs. Deriar, 31 Mo., 15; Tayl. Land. & Ten., 14.) Hence a notice to quit and the fixing of a time when the tenancy would cease were necessary. These acts do not appear to have been done. Therefore, the petition does not show that the plaintiff in error was at any time a trespasser. (2 Wagn. Stat., 879 §§ 12, 13; 1 Washb. R. P., 392, § 35 [2nd Ed.], *id.* 400, § 13; Williams vs. Deriar, *supra*, *et seq.*; Ridgely, vs. Stillwell, 25 Mo., 570.)

II. If defendants' right was a mere license, it is shown by the proof to have been an established one which carried an interest in the land.

III. Plaintiff's petition shows that he had his remedies at law, in trover, replevin, or covenant of seizin, quiet enjoyment, etc.

IV. The petition creates a reasonable doubt as to the validity of the title, and the answer puts it in issue. Hence, plaintiff should bring his action at law, and the injunctions should be dissolved. (1 Washb. R. P., 126, § 61, [2nd Ed.]; Hackensack Imp. Co. vs. N. J. Midland R. Co., 22 N. J., 94; Walker's Reports, [Miss.,] 176; 1 Howard's Reports, [Miss.,] 108; Nonday vs. Rowe, 19 Vesey, 153, 4 Johns. Chy., 21; Echelcamp vs. Schrader, 45 Mo., 505; Hill. Inj., 21, §§ 35, 36.)

*B. Benson Cahoon, for Defendants in Error.*

I. It is now well settled that where a trespasser digs into and works a mine to the injury of the owner, an injunction will be granted, because it operates a permanent injury to the property as a mine. (See cases cited in 7 Ves., 308; Mitchell vs. Dors, 6 Ves., 147; Smith vs. Collyer, 2 Ves., 90; Grey vs. Duke of Northumberland, 17 Ves. 281; Falmouth [Lord] vs. Inneys, Mosely, 87, 89; 2 Sto. Eq. Jur., § 929.)

II. The rules and regulations, and the register, gave to respondent but a simple license. (Cook vs. Stearns, 11 Mass., 533;



---

 Lockwood, et al. v. Lunsford.
 

---

Taylor vs. Waters, 7 Taunt., 374; Mumford vs. Whitney, 15 Wend., 380; Wolfe vs. Frost, 4 Sandf. Ch., 72; Bridges vs. Purcell, 1 Dev. B. L., 496; 3 Kent Com., 452; 1 Washb. R. P., 542; Doolittle vs. Eddy, 7 Barb., 74; Morse vs. Copeland, 2 Gray, 302; Jackson & Sharp Co. vs. The P. W. & B. R. R. Co., 11 Amer. Law Reg. [or the June No. of 1872], p. 380; Wood vs. Leadbitter, 13 M. & W., 838; 1 Washb. R. P., § 3, p. 543; 3 Kent's Com., 452; Tillotson vs. Preston, 7 Johns. Ch., 285.)

*John F. Bush*, for Defendants in Error.

I. Equity interferes by injunction, and restrains tortious and wrongful mining by one person on lands of another, for the purpose of preventing the destruction and preserving the estate. (Thomas vs. Oaksley, 18 Ves., 186; Hanson vs. Gardner, 7 Ves., 305 (notes); Earl Cowper vs. Baker, 17 Ves., 128; Gray vs. Duke of Northumberland, 17 Ves., 281; Mitchel vs. Dora, 6 Ves., 147; 2 Eden Inj., 231-34, and notes; Willard's Eq. Juris., 382; 2 Sto. Eq., 929; James vs. Dixon, 20 Mo., 79; Eckelcamp vs. Schrader, 45 Mo., 505; Weigel vs. Walsh, 45 Mo., 560; Burgess vs. Cattleman, 41 Mo., 480; Merced Mining Co. vs. Fremont, 7 Cal. *supra*, 317.)

II. Lunsford's right was a mere license and subject to revocation. (Houx vs. Seat, 26 Mo., 178; Prince vs. Case, 10 Conn., 375; Ruggles vs. Lessure, 24 Pick., 187; Wood vs. Leadbitter, 13 M. & W., 838; Dean vs. Fuhr, 26 Mo., 116; Bainbridge on Mines, 307; 1 Washb. R. P. 399-401; Hazzleman vs. Putnam, 3 Chandler.) And the alienation of the Mine LaMotte domain, including the "Sulphur Lead" now in controversy, was a revocation of Lunsford's mining license. (1 Washb. R. P., 399-400; Prince vs. Case, 10 Conn., 375; Ruggles vs. Lessure, *supra*; Houx vs. Seat, 26 Mo., 178.)

III. Lunsford was in a state of utter and hopeless insolvency. No action of trespass lay in favor of Lockwood & Scott, who were out of possession. (Reed vs. Price, 30 Mo., 441; Cochran vs. Whitesides, 34 Mo., 417.)

---

Lockwood, et al. v. Lunsford.

---

VORIES, Judge, delivered the opinion of the court.

This was a petition for an injunction filed by the plaintiffs against the defendant, for the purpose of restraining the defendant from wrongfully digging and removing certain minerals from the lands claimed to belong to the plaintiffs.

It is charged by the petition, that the plaintiffs are the owners and proprietors of a confirmation grant, and tract of land, lying partly in the county of Madison, and partly in the county of St Francois, State of Missouri; and known as Mine LaMotte; that the grantors, under whom plaintiffs claim title, have had the uninterrupted possession of said land for more than twenty consecutive years; that before and since plaintiffs have come into the possession of said tract of land, the defendant has unlawfully and forcibly had and occupied a small lot of ground about 40 feet square, being a part of said tract of land, (which lot is described in the petition,) known as the "Lunsford Shaft" or "Sulphur Lead;" that said lot of ground is mining or mineral land, the chief and sole value of which consists in the lead ore, and other mineral deposits which said ground contains; that the Mine LaMotte claim or confirmation, of which said lot forms a part, is a large body of land containing extensive deposits of lead and other ores, on which said tract of land, mining for said minerals or ores is carried on under the authority and directions of plaintiffs; that the defendant has no title, either in law or equity, to the said lot or parcel of mineral land, nor has he any right to the possession thereof; that long before the purchase of said Mine LaMotte by plaintiffs, certain rules and regulations were established, by the former owners of said tract, for the purpose of mining in and on the same; the tenor of which was, that parties desiring to work as miners thereon, were required to register their names as miners in a book to be kept by said owners of said land, for that purpose; that after said miners' names were registered, they were permitted to go on said tract and stake off a lot of land 40 feet square, the description of which was to be registered,

when permission was given them to work the same, upon condition that they should deposit with the smelters of ore on said tract, one-tenth of the mineral mined, for the benefit of the owners of said tract of land; that among said rules and conditions there was one, by which said miners were compelled to work the ground selected by them, and upon their ceasing to work the same for ten consecutive days, then the license or permit given them was to cease, and their claim to be wholly forfeited.

The petition alleged that the license or interest of the miners under said rules were liable to be revoked or terminated at any time that the owners saw fit, all of which terms and conditions were well known to the miners; that when notice was given to defendant by R. F. Fleming, as hereinafter to be stated, similar notices were given by the same person to all other miners working on said tract, under said rules at the same time with the defendant, and that upon receiving said notice all such persons, except defendant, delivered to said owners peaceable possession of their said lots of mineral lands, so worked out by them; that neither plaintiffs nor those under whom they claim, have ever leased said premises or lot of mineral land to defendant, and the only right he ever had in or to said premises, was a parol license or permission given him by the former owners of said Mine LaMotte tract, to dig for ore in the manner and under the rules aforesaid; that the said lot is unlawfully and forcibly in the possession of defendant; that plaintiffs have not since or before they became the owners of said Mine LaMotte tract, in any manner given the defendant, or any other persons, any license or permission to occupy, work or mine in or on said shaft or lead, known as the "Lunsford Shaft," or any other part of said tract of land; that previous to the purchase of said Mine LaMotte tract of Robert F. Fleming and others, by plaintiffs, due notice in writing was given to defendant, by said Fleming, for himself and other owners, demanding that he deliver the immediate possession of all mineral grounds worked by him as aforesaid, and the appurtenances, to the said owners thereof;

---

Lockwood, et al. v. Lunsford.

---

that subsequent to this notice, on the 6th day of September, 1861, plaintiffs demanded in writing, of defendant, the possession of said lot before worked by him; that he refused to deliver or quit the possession or occupation thereof either to said Fleming, or to plaintiffs; that immediately after said notice by said Fleming, defendant ceased mining operations in said "Lunsford Shaft," but forcibly deprived plaintiffs of the possession thereof, and subsequently, unlawfully commenced to work and mine the same, and now continues to work the same.

The plaintiffs then further charge, that said plaintiff Lockwood, commenced an action of unlawful detainer against the defendant before a justice of the peace, and that he regularly prosecuted said action to final judgment, and recovered a judgment against defendant for the possession of said lot and premises, and costs; that a writ of restitution was duly issued on said judgment, and placed in the hands of the proper sheriff to be executed; that said officer refused to execute the writ, and returned the same unexecuted on the 14th day of October, 1869; that on the 18th day of October, 1869, defendant, and other persons whose names are unknown, and who were acting for, and in concert with the defendant, unlawfully and forcibly, and against the will of plaintiffs, commenced to mine in and remove ore from said sulphur lead, and are still continuing so to do; that plaintiffs at said time had and still have the exclusive right to said premises, and to the possession thereof, which was well known to defendant; that said defendant, and others working under him intended to and will, unless restrained by the order of this court, extract from, and carry away all of the valuable mineral from said "Lunsford Shaft" or "Sulphur Lead," as aforesaid; that said mineral is of great value, and the land is almost valueless except for the mineral; that defendant is wholly insolvent, so that a judgment at law would be unavailing, and that great and irreparable injury will be done unless the defendant is restrained therefrom. An injunction is therefore prayed, and a prayer for general relief.

A temporary injunction was issued by the judge of the court in vacation, and a writ issued returnable to the next term of the court at which time the defendant appeared and answered the petition.

The answer denies that plaintiffs are the sole owners of the Mine LaMotte tract or lot in question, and charges that the deed by which plaintiffs derive their title to an undivided part of the lot is void; and the answer puts in issue the whole facts of the petition. The answer then sets up a claim to, and right to occupy said mine, and dig ore from the said "Lunsford Shaft" as aforesaid, by virtue of a license or lease from the former owners of said Mine LaMotte tract, and under rules and regulations promulgated by them, and that by virtue of said license and rules he had a right to take the ore from said mine, &c.

Plaintiffs filed a replication denying all affirmative matters in the answer.

After the issues were thus framed, the defendant filed a motion to dissolve the injunction before granted. This motion assigns a great many reasons for the dissolution of the injunction, amongst which it is stated that the petition does not state facts sufficient to entitle plaintiffs to the relief prayed; that they have a remedy at law, and that the facts set up in the answer, amount to a full defense to the action, &c.

The cause was afterwards taken up, and by the parties submitted to the court for hearing upon the issues joined. The court after hearing the evidence found the facts for the plaintiffs, and rendered a judgment and decree perpetually enjoining defendant from taking ore from the mine in question, &c.

The defendant filed a motion for a new trial, and in arrest of judgment which being severally overruled, he excepted, and has brought the case to this court by writ of error.

The record in this case is a long one, and abounds in objections and exceptions made by the different parties, to various rulings of the court made during the trial of the cause, most of which related to matters not really material to the rights of the parties. It will therefore only be necessary to notice

those objections raised in this court, which go to the merits or the right of action or defense.

The plaintiffs on the trial, after having offered evidence tending to prove possession of the land in those under whom they claimed for more than twenty years, offered in evidence a deed from John A. Weber, Francis L. Valle and John Betton, to John H. Fry, for an undivided part of the title to the tract of land known as Mine LaMotte, the deed being dated Oct. 28, 1868. This deed was objected to, on the ground that its tendency was to prove title to the premises in the plaintiffs, which fact it was contended by the defendant could only be tried by a jury. The plaintiffs also offered in evidence a deed from the said Fry to plaintiffs for the same land, dated March 6, 1869. This deed was also objected to by the defendant on the same ground stated, to the deed from Weber and others, to Fry. This objection was overruled by the court, and this action of the court it is insisted by the defendant was erroneous.

In this case the trial of the issues involved in the case, was submitted by the parties to the court, and in fact it is a case that must have been tried by the court; the court having the right under the statute, to take the opinion of a jury upon any specific question of fact involved. (2 Wag. Stat., 1041, § 13.) But the court was not bound to submit any such question of fact to a jury. It is very true that courts of equity, will not usually grant a perpetual injunction in cases where the title to the premises are put in issue, and where from the evidence in the case the title appears to be in doubt, but will in such cases only make a temporary injunction to restrain the parties until the title can be settled at law. (Echelkamp vs. Schrader, 45 Mo., 505; Storm vs. Mann, 4 John. Ch., 21.) This objection does not however apply as to the admissibility of the evidence, but it is a matter for the consideration of the Chancellor, upon the final determination of the case. (Hicks vs. Michael, 15 Cal., 107.) It may as well be stated here, that from the evidence in the case, and the defense set up and relied on by the defendant, he does not claim



---

Lockwood, et al. v. Lunsford.

---

an adverse title, to the title of the plaintiffs, but he only claims a license to work a mine from the grantors of plaintiff, who were always in possession of the land for at least twenty years, until they delivered the possession to the plaintiffs. So that upon the whole case there seems to be no real question as to the title, although the answer denies that the plaintiffs are the sole owners of the land. The real question in the case was as to the defendants' right under a license from the owners to work the mines and extract the ores. The deeds were therefore properly admitted in evidence.

The plaintiffs next offered in evidence, a deed from R. F. Fleming, Administrator, with the will annexed, of Thomas Fleming, deceased, to R. B. Lockwood, dated July 18, 1869; also a deed from Robert F. Fleming, as executor of Thomas F. Fleming deceased, to R. B. Lockwood, dated July 8, 1869, for the same lands or undivided interest therein. Also a deed from R. F. Fleming for himself, and as executor of the will of Thomas Fleming deceased, to R. B. Lockwood, for the same lands. Each and all of these deeds were objected to, because the plaintiffs had failed to show any authority in the executors and administrators named therein, to convey. The objection being overruled the defendant excepted.

Plaintiffs then offered in evidence a deed from R. F. Fleming, C. F. Fleming and thirteen others, purporting to be the widow, heirs and representatives, of Thomas Fleming, deceased, of Philadelphia, and of Thomas Fleming, late of Madison County, Mo., to R. B. Lockwood, dated October 20, 1869. This deed refers to the three last deeds given in evidence, and confirms each of said deeds in express terms, and conveys by quit-claim, the right, title and interest of such heirs, to the grantee in said deeds. This last deed was objected to, on the same ground for which the three last deeds were objected to, and on the ground that it was not shown, that the parties were the heirs of Fleming, as they were represented. The plaintiffs also proved that part of the grantors were the real heirs and representatives of Thomas Fleming, deceased. And the defendant admitted that the title to

Mine LaMotte tract of land, was originally in the said Thomas Fleming, and in Weber, Valle and Betton. The court properly overruled the objection to all and each of the four last, named deeds. The three first, by the provisions of the last, were adopted by the last deed, and made a part of it, and were admissible in evidence as a part of the deed of confirmation of the heirs of Thomas Fleming, deceased, and part of the grantor in said deed, were proved to be the proper children and heirs of Thomas Fleming, deceased, who it is admitted by the defendant was a part owner of the land named. These admissions of the defendant are conclusive as to the title being in the grantees of Fleming's heirs, and the deeds were therefore material and properly admitted in evidence.

It should be stated that by these deeds, the land was conveyed to Lockwood, for the use of himself and Scott. The plaintiffs also offered in evidence the transcript of the proceedings had before a justice of the peace, in which Lockwood was plaintiff, and defendant in this case, was the defendant. The action was an action of unlawful detainer, and in which the plaintiffs had recovered a judgment for the premises named in the petition, &c. This transcript was objected to on several grounds, but the objections were overruled, and the defendant excepted. It is only necessary to say in reference to this transcript, that as I view this case, it was not material to the plaintiff's right of recovery, and could do neither good to the plaintiffs, nor harm to the defendant, as the other facts in the case, are found by the court. The judgment would be just the same without this evidence as with it.

The plaintiffs also introduced evidence tending to prove that they had received the possession of the Mine LaMotte tract of land, from Valle, Weber and Betton, in part, and from Flemings' in part; that they received the possession in March, 1869.

The evidence of the plaintiffs was sufficient to prove all of the main facts stated in the petition. This is not serious-



---

Lockwood, et al. v. Lunsford.

---

ly disputed. But the defendant contends that the plaintiffs could not have a perpetual injunction in this case, because they had a remedy at law, and that the facts are not sufficient to authorize any equitable relief. The facts of the case show that the defendant was engaged in unlawfully against the will of plaintiffs, extracting and removing the ore, from a valuable mine belonging to the plaintiffs; that the land was only valuable for the minerals which were being removed; that defendant threatened to continue his work of extracting the mineral from said land, to the great damage and destruction thereof; that defendant was wholly insolvent, so that a judgment at law would be unavailing.

It has for a long time been settled, that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted, and more particularly so where the trespasser is insolvent, so that an action at law could not avail. (2 Sto. Eq., § 929; *More vs. Masini*, 32 Cal., 590; *Thomas vs. Oakley* 18 Vesey, 184; *Mercel Mining Co. vs. Fremont*, 7 Cal., 317.)

The defendant set up as a defense to this action, that he held the mine out of which he was removing the mineral, by virtue of a lease or license from the grantors of the plaintiffs to him, and that he was not therefore unlawfully removing said mineral from said mine. The whole question as to the defendants' rights under the evidence in the case, was fully considered and passed on by this court, in the case of *Lunsford vs. The LaMotte Lead Company*, (54 Mo., 426). The facts in that case in reference to the defendants' rights as a miner, and the facts in this case are identical in all of their material features. The same rules regulations, &c., were relied on in each case. In that case we held that under the evidence the defendant was a mere trespasser in working the mines. We do not propose to re-investigate this whole matter, but simply content ourselves by referring to the opinion in that case. We suppose that the real merits of this case were really settled by that case, except, as to a question of costs.

---

Helmrichs v. Gehrke.

---

There seems to be no substantial error in the case. The judgment will therefore be affirmed. Judge Wagner absent. The other judges concur.

— 0 —

GEORGE J. HELMRICHS Appellant, vs. GEORGE GEHRKE, Respondent.

1. *Evidence—Writing—Verbal stipulation cannot contradict.*—The doctrine is well established that no antecedent or contemporaneous verbal stipulations are admissible to contradict or vary the terms of a written instrument.

*Appeal from St. Louis Circuit Court:*

Henry N. Hart, for Appellant.

F. & L. Gottschalk, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action to recover from the defendant the amount plaintiff had been compelled to pay as an indorser of a negotiable promissory note. The petition alleges that the firm of F. W. Plass & Co., was indebted to the defendant in about \$6,000, and also to various other creditors; that this firm proposed to compromise with their creditors at forty cents on the dollar, and applied to the defendant to join in the compromise, but he would only agree to compromise his debt and release them for \$4,500.50, to be paid in three negotiable notes, at six, twelve and eighteen months with good indorsers; and Plass & Co., agreed to this and furnished the notes, one of which was indorsed by the plaintiff; that it was agreed on all hands that these notes were not to be used, but to be returned and cancelled, if the firm failed to make a compromise with all of their other creditors on the terms proposed by them; that they did fail to make the compromise and afterwards demanded the said notes from defendant; that defendant refused to deliver up the notes, but converted this

note to his own use by negotiating it to an innocent holder, and the defendant was compelled to pay the same, as Plass & Co., went into bankruptcy.

The defendant denied all the allegations of the petition.

On the trial, each party gave evidence conducing to prove his theory of the cause. The defendant on his part produced a written agreement under which he had taken the notes for his claim. The only terms of this agreement, as expressed by the writing, were that the defendant was to sign a paper to be exhibited to the other creditors, to the effect that he would compromise and release Plass & Co., for forty per centum of his debt. The plaintiff offered evidence to prove that at the time this written agreement was made, it was also agreed by parol that the indorsed notes were to be returned and cancelled as alleged in the petition, provided the other creditors refused to compromise, and that they did refuse to compromise. The defendant objected to this evidence and it was rejected by the court, and the plaintiff excepted.

The court gave instructions which fairly presented the theory of each party to the jury as claimed by them in the pleadings. The court also instructed in regard to the written agreement—that if the jury found that there was such an agreement, it could not be varied or contradicted by the parol evidence. The plaintiff excepted to all of these instructions, and asked instructions on his part which were refused; but they are not set out or saved by the bill of exceptions. The jury found for the defendant, and plaintiff filed a motion for a new trial, which was overruled. Judgment was rendered against him at special term and he appealed to the general term which affirmed the special term, and he has brought the case here by appeal.

There seems to be nothing in this record to allow us to disturb this judgment.

There is no foundation in the pleadings on which to raise the question as to whether the note in dispute was obtained by fraudulent misrepresentations; nor does the evidence justify that conclusion. The only question presented by the

---

Edwardson v. Garnhart.

---

pleadings and evidence was whether the note was absolutely delivered, or only placed in defendant's hands to be returned and cancelled in case no compromise was made with all the other creditors of Plass & Co. The written agreement produced by the defendant placed this point beyond dispute.

The doctrine is well established that no antecedent or contemporaneous verbal stipulations are admissible to contradict or vary the terms of a written agreement.

Let the judgment be affirmed. The other judges concur.

—o—

SAMUEL B. EDWARDSON, Respondent, vs. JOHN H. GARNHART,  
Appellant.

1. *Reference in invitum—Jury—Constitution.*—In an action at law involving the examination of a long account, the court may properly refer the case on the motion of one and against the objection of the other party (See Wagn. Stat., 1041, § 18.)—This provision is not unconstitutional as depriving the objecting party of the right to trial by jury (Const. Art. I, § 17). Such power of reference had been authorized and exercised for twenty years prior to the present constitution. And the object of the framers of that instrument must have been to preserve the right of jury trial as it then existed and has been practiced upon, and not to establish a new rule on that subject.
2. *Referee—Statutory oath—Report—Recital of touching.*—The recital in a referee's report that he had been "duly qualified" is at least *prima facie* evidence that he had been sworn as the statute required; particularly in a case where the parties had proceeded without objection to hear the whole case before the referee.
3. *Referee—Report—Objections to raised first in Supreme Court not heard.*—The objection that a referee failed to find separately on each count of the petition, when not made to the report or raised by a motion for a new trial will not be considered by this court.
4. *Judgment—One rendered on two counts not ground for reversal, when.*—*Semble*, that where an action was founded upon one continuous account for services for two years, the contract for the second year being only a slight modification of the original agreement, one judgment rendered on both counts would not be ground for reversal.
5. *Business commissions of clerk—Power of attorney—Conversion of funds drawn under—Borrowed money—Interest on, etc.*—In suit by a clerk for a proportion of the business profits, guaranteed to him by defendant, where it appeared that the latter had employed a third party to transact business for him

---

Edwardson v. Garnhart.

---

in his absence, and that without the consent of plaintiff he had given him power of attorney to draw money, execute notes, etc, in defendant's name; *semble*, that money so taken out of the business by said third person, and not accounted for, could not be charged to the profit and loss account of the concern, but should be borne by the defendant personally. *Held*, also that plaintiff not being required to furnish any part of the capital, defendant could not charge against plaintiff an *aliquot* portion of the interest upon funds borrowed by defendant to carry on the business.

*Appeal from St. Louis Circuit Court.*

*Cline, Jamison & Day*, for Appellants.

I. This being an action at law was for a jury, and defendant not consenting, to waiving a jury, was wrongfully referred. Under § 17, Art. I, State Const. there can be no compulsory reference of an action at law. (*Townsend vs. Hendricks*, 40 How. Pr., 143; *Greene vs. Norris*, 19 Cal., 140.)

II. There is no pretense that the referee was sworn as required by statute (Wagn. Stat., 147, § 30), or that the affidavit was waived. Hence, all the proceedings were illegal. (*Webb vs. Huse*, 38 Mo., 210; *Tucker vs. Allen*, 47 Mo., 488; *Fassett vs. Fassett*, 41 Mo., 516; *Toler vs. Hayden*, 18 Mo., 399; *Frissell vs. Fickes*, 27 Mo., 557; *Valle vs. North Mo. R. R. Co.*, 37 Mo., 445.)

III. The referee should have found separately on each count. (*Brownell vs. Pacific R. R.*, 47 Mo., 239; 19 Mo., 551; 36 Mo., 215; 41 Mo., 405; 45 Mo., 269.)

*Krum & Patrick* for Respondent.

VORIES, Judge, delivered the opinion of the court.

The petition in this case states, that in the year 1867, and for years before that time, the defendant was and had been engaged in the business of a merchant, in buying and selling liquors and other merchandize, in the City of St. Louis; that in January, 1867, he entered into an agreement with defendant whereby plaintiff undertook to give his personal services to the defendant, in and about his said business, for and during the year 1867, and that for such services the defendant agreed, by way of compensation for the plaintiff's services, to pay the

plaintiff one-eighth part of the net profits made by said business during said year, less \$1,000, which was to be deducted from the profits realized for the sale of Kelly's bitters. The plaintiff then avers a performance of the contract on his part; that the net profits made by said business for said year 1867 amounted to the sum of \$50,000 and upwards; that the share of the profits to which plaintiff was entitled was \$6,250 and upwards; that defendant had paid plaintiff at different times sums of money amounting in the aggregate to the sum of \$1,400; that the defendant, though requested so to do, had refused to pay plaintiff any further sum, wherefore he sued, etc.

The plaintiff then, as a second cause of action, charges that he had a similar agreement with defendant for the year 1868, except that no deduction was to be made for the profits on the sale of bitters for that year; otherwise the second cause of action is similar to the first. The profits for the year 1868 are stated to be the sum of \$60,000 and more, and that plaintiff has received the sum of \$1,600 and no more, and judgment is prayed for one-eighth of the profits made after deducting the sum paid, etc.

The defendant's answer is a simple denial of the allegations of the petition.

The case was afterwards referred to one J. W. Luke, as referee, to hear the proof and state an account between the parties.

The referee, after notifying the parties of his intention to do so, proceeded to take the evidence in the cause; both parties appeared before the referee, and each produced witnesses who were examined and cross-examined by the respective parties, and the evidence reduced to writing. The referee afterwards filed the following report of his proceedings and of his findings in the cause, to-wit: "In obedience to the order of this court, referring the above entitled cause to me to hear the proofs, and state an account between the parties, (having been previously qualified) I caused the parties to be duly notified to appear before me, at my office, in the City of St. Louis, on the 23d day of January, A. D. 1872, as will appear by said



notice hereto annexed. On said day the plaintiff and his attorney, and the defendant by his attorney, appeared before me, and I heard the proofs of the parties respectively, all of which I return herewith and make the same a part of my report. And I further report to the court, that from the evidence aforesaid I find and state the following, which, in my judgment, is a correct and just account between the parties, to-wit: I find that there is an actual amount due to the plaintiff by the books of the defendant, of \$4,380.89, to which should be added the sum of \$455.08, charged to the plaintiff as his interest in the balance of account due by Edgar J. Noe, and also the sum of \$359.36, being the one-eighth of the sum of \$2,874.91, charged as discount and interest and included to the debit of merchandise account for the years 1867 and 1868, making a total sum of \$5,195.32. And I further report that the sum before mentioned, \$5,195.32, was due to plaintiff on February 1, 1869, and that plaintiff is entitled to interest on the same from that date to February 6, 1872, the day on which the hearing was closed, amounting to \$940.35, which added to \$5,195.32 makes a total of \$6,135.67, which last named sum I find and report to be due from the defendant to the plaintiff."

The report further proceeded to state that the amount found to be due the plaintiff did not include his interest in some suspended debts named, &c. The defendant filed various objections and exceptions to the report of the referee. These exceptions were heard by the court and overruled, to which the defendant excepted.

The court afterwards rendered a judgment on the report in favor of the plaintiff for the sum of \$6,176.57, the amount found to be due by the referee. The defendant in due time filed his motion for a new trial, setting forth the same grounds set forth in his exceptions to the report of the referee. The court overruled this motion and the defendant again excepted and appealed to the general term of the St. Louis Circuit Court, where the judgment being affirmed he appealed to this court.

The grounds of objection relied on in this court by the de-

fendant, for the reversal of the judgment of the St. Louis Circuit Court are, first, that the court improperly referred the cause to a referee to take an account between the parties without the consent of the defendant; second, that the referee was not sworn as the statute requires before hearing the case; third, that the referee found a gross amount as due the plaintiff in the whole case, but made no separate finding on the separate counts in the petition; fourth that the referee improperly found the sum of \$455.07, which was charged to the plaintiff as his part of the balance of account charged to Edgar J. Noe, who was dead; fifth, that the referee committed error in allowing to the plaintiff the sum of \$259.36, being one-eighth of the sum of \$2,874.91, on the ground that the same had been overcharged to the plaintiff in his account, as interest for money borrowed and used by defendant in his business for the year 1867, and sixth, that the referee erred in allowing plaintiff interest on his account after February, 1869:

These objections will be examined in the order in which they have been stated:

1. It is contended that the constitution provides that the right of trial by jury shall forever remain inviolate, and that this action being an action at law, the defendant had the right to have the questions of fact involved therein tried by a jury; that if our statute providing for the reference of cases is to be construed to include actions at law, the statute itself would be unconstitutional and void. Our statute provides that the court in which a cause is pending, may on the application of either party, direct a reference where the trial of an issue of fact shall require the examination of a long account on either side, etc. (Wagn. Stat., 1041, § 18.) This statute has been in force in this State for at least thirty years, twenty years before the adoption of our present constitution. It is not to be presumed that the provision of the constitution relied on, was intended to change the law as it then existed and had been practised on in the State for a quarter of a century; the object of the framers of the constitution must

have been to preserve the right of trial by jury, as it then existed and had been practiced in the State, and not to establish a new rule of practice on that subject. The present action was brought to recover one-eighth of the profits of a business establishment in which the profits are charged on one side to have amounted to from fifty to sixty thousand dollars per year, which was denied by the other side. These issues necessarily involved the examination of a long account and were properly referred.

The next objection made by the defendant is that the referee was not sworn, as the statute requires, before hearing the case. The record shows that the referee notified the parties of the time and place at which he would take evidence and hear the case, and that at said time both appeared and introduced their witnesses, and went into a long examination of the case without making any objection as to the authority of the referee. No question was raised as to the referee having been sworn as such until after the report was made against the defendant.

The referee, in his report, states that in obedience to the order of the court referring the cause to him, to hear the proof and take an account between the parties, "*having been duly qualified*, I caused the parties to be notified," &c. No evidence appears to have been offered on either side as to the referee having been sworn, except what appears in the report. The recital by the referee that he had been duly qualified must be understood that he had been duly sworn, and as he was an officer of the court, and his acts are presumed to be within the knowledge of the court, the recital in the report that he had been duly qualified is at least *prima facie* evidence that he had been sworn as the statute required; particularly in a case where the parties had proceeded without objection to hear the whole case before the referee.

The third objection urged by the defendant is, that the referee failed to find separately on each count in the petition, but found a gross amount on the whole petition for which a judgment was rendered. This objection was not raised in the

Circuit Court either in the defendant's objections to the report of the referee, or in the motion for a new trial, or otherwise. The attention of the Circuit Court was in no way called to said objection, and it is too late to raise the objection for the first time in this court. The action, though the petition in form contained two counts, was founded on a continuous account for two years' services, the contract for the second year only being a slight modification of the original contract, so that no injury could possibly result to the defendant by such an irregularity. (*Newton vs. Miller* 49 Mo., 298; *Wright vs. Baldwin*, 51 Mo., 265.)

In reference to the fourth objection made by the defendant, it seems from the evidence, that he was carrying on the business of a liquor merchant; that in said business he employed plaintiff as a salesman and otherwise to assist him in his business, and agreed to give him, as compensation for his services, one-eighth part of the net profits thereof; that defendant, at the same time, or about the same time, employed one Edgar J. Noe (his brother-in-law) as a book-keeper in said business, and agreed to give said Noe as a compensation for his services one-sixth part of the net profits of the business; that during the time for which plaintiff was so employed, the defendant was away from home a considerable part of the time, and for that reason he gave said Noe a power of attorney by which he authorized Noe to transact his entire business during his absence; that Noe was given full authority to draw money out of the bank, to execute notes, bills and drafts in the defendant's name, and transact the business generally for defendant and in his name, in the same manner as defendant could or would do himself; that he also did some business for defendant not connected with the business house. It also appears that during the time that Noe was in the employment of defendant he drew money out of the bank which belonged to or was money used in the liquor business, over and above the full amount of his wages, or one-sixth part of the net profits of the business, to the amount of \$3,640.62, which was converted to his own use, or not ac-

counted for; after which he died; that this sum was charged upon the books of defendant to the account of profit and loss, one-eighth of which was charged to plaintiff or deducted out of his share of the profits which would otherwise have been made. The referee deducted this charge from the account charged against the plaintiff, and this deduction is what is complained of.

It is insisted by the defendant, that this money used by said Noe was properly charged to the account of profit and loss, just in the same manner as other bad debts were charged. This position would, in ordinary cases, be correct, but it is insisted by the plaintiff, that as the defendant had, by power of attorney, given Noe full power over the money of the concern, with full power to draw money out of the bank, make acceptances, draw checks, make bills and execute notes, &c., in the defendant's name, what Noe did in the premises was the act of the defendant, and if money was so drawn out of the concern, that in effect, it was the defendant drawing the same, and if it was converted in this way by Noe and lost to defendant, that it was his loss, as the plaintiff had never consented to such authority being given to said Noe. The referee took this view of the case and struck out from the charges against plaintiff the one-eighth part of the money so used by said Noe. Under the particular circumstances of this case, we cannot say that the referee did wrong.

As to the fifth objection made by the defendant, it seems from the evidence, that during the time that plaintiff was employed for the defendant, the latter at different times borrowed money to use in his said business, on which he paid by way of discount and interest the sum of \$2,874.91; this sum was also charged to account of profit and loss, and in this way, charging one-eighth part thereof to plaintiff, this amount was stricken from the account against plaintiff, which is the ground of the fifth objection made by the defendant. From the evidence in the case there is no pretense that plaintiff was to furnish any part of the capital used in the business or anything besides his labor and services. If the defendant could borrow

the money to carry on the business and charge the interest thereon to account of profit and loss, he would thereby cause plaintiff to, in effect, furnish one-eighth part of the capital with which to carry on the business. This the plaintiff had not agreed to do, but the defendant had, at least by his contract, impliedly agreed to furnish what capital was used in the business, and the plaintiff had only agreed to furnish his labor. We, therefore, think the referee did right to strike said item from the account against the plaintiff.

The only remaining point made by the defendant in this court is, that the referee erred in giving the plaintiff interest on his account against the defendant after the 1st of February 1869. Our statute provides that creditors shall be allowed interest on accounts after they become due and demand made. The evidence in reference to the time at which plaintiff's account became due, and the time at which demand of payment was made by the plaintiff was conflicting; there was evidence which certainly tended to prove that the plaintiff's account was due, and payment demanded before the first of February, 1869, and the referee found the facts in favor of the plaintiff, and we see nothing to justify us in reversing the judgment on that account.

The other judges concurring, the judgment is affirmed.

—o—

PETER FLORIAN WALSER, Respondent, *vs.* FREDERICK THIES,  
Appellant.

1. *Malicious attachment—Action for damages for—Participation of defendant in levy not necessary to.*—It is not necessary to the maintenance of an action for malicious attachment that defendant should have participated in the execution of the attachment process. If he makes out the affidavit maliciously, vexatiously and without probable cause, this is sufficient, without proof of further intervention on his part, to render him liable in damages for any resulting injury.
2. *Malicious attachment, action for—Malice—Probable cause.*—In suit for malicious attachment, malice need not be expressly proved, but may be inferred.



## Walser v. Thies.

ed from want of probable cause. And notwithstanding proof of probable cause for attachment if from bad or malicious motives, oppressive and vexatious litigation is carried on, the action for damages will lie.

3. *Malicious attachment—Exemplary damages.*—In suit for malicious attachment, exemplary damages may be awarded.
4. *Damages, excessive—Intervention of Supreme Court.*—Before the Supreme Court can interfere on the ground of excessive damages it must appear that manifest injustice has been done.
5. *Malicious attachment and prosecution—Rules as to damages.*—The rules as to damages applicable to cases of malicious prosecution apply to actions for malicious attachment.

*Appeal from St. Louis Circuit Court.*

*E. C. Kehr*, for Appellant.

Defendant in no wise participated in the execution of the attachment process. He neither delivered the writ to the constable nor did he direct him to levy, nor indicate to him the property to be levied on, nor was he present at any time whilst the levy was in force. (Drake At., § 730.)

To maintain this action it must appear that plaintiff in the attachment knew that he had no cause of action, and that he acted maliciously therein. (Alexander vs. Harrison, 38 Mo., 258; Drake At., § 734.)

There was no case made for exemplary or vindictive damages. The ingredients of "malice, violence, oppression or wanton recklessness," are wanting altogether. (Kennedy vs. North Mo. R. R. Co., 36 Mo., 351, 365; Franz vs. Hilterbrand, 45 Mo., 121.)

The damages, even after the *remittitur* are obviously excessive and unwarranted, and in such case the Appellate Court will award a new trial. (Pratt vs. Blakey, 5 Mo., 205; Woodson vs. Scott, 20 Mo., 272; Barth vs. Merritt, 20 Mo., 567; Wells vs. Sanger, 21 Mo., 354; Goetz vs. Ambs, 22 Mo., 170.)

*Hitchcock & Lubke*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action for damages for maliciously suing out two writs of attachment against the plaintiff and his property.

It appears that plaintiff was carrying on a boarding house and saloon business in the City of St. Louis, in a building he had rented from the defendant, and that the defendant without any previous notice, and without any probable cause, as is alleged, sued out the attachments, had the defendant's property levied upon, and his business closed up; by which he suffered great injury.

The only matters complained of in this court are first, that the Circuit Court erred in refusing to give defendant's instruction that the plaintiff was not entitled to recover; and that the court misdirected the jury on the question of damages.

With the exception of the instruction above refused, the court gave all the defendant's instructions, and they were certainly very favorable to him.

It is now insisted that it did not appear either from the pleadings or the proof, that the defendant had in any wise participated in the execution of the attachment process, and that unless that fact occurred the plaintiff had no right to resort to this action.

To support this view, Drake on Attachments, § 730, is cited and relied on. In that section the learned author quotes *Marshall vs. Bether*, (17 Ala., 832), to support the proposition, that it is not sufficient in actions of this kind to aver that the defendant caused and procured an attachment to be wrongfully and maliciously and without probable cause sued out against the plaintiff, and that the writ was placed in the hands of a sheriff, and was by him executed; but that the defendant must be connected by averment with the execution of the process, by delivering the writ to the officer, or participating in his proceedings.

We are not willing to concede that it is necessary to the maintenance of the action that the defendant should in person deliver the writ to the officer, or be present and point out the property and tell him what to do. It is the duty of the court to deliver the process to its executive officer, and it is the duty of that officer to levy the attachments on whatever property may be necessary to satisfy the same. The plaintiff

in the suit sets the whole proceeding in motion by making out the affidavit, and if he does the same maliciously, vexatiously and without probable cause, and injury results from his unlawful and wrongful act, he is liable and must respond in damages.

The averment in the petition is, that the defendant did unlawfully, wrongfully and maliciously, and without probable cause sue out the attachment, and that he procured and caused plaintiff's property to be levied upon, and his business to be interrupted. This allegation is, I think, abundantly sufficient. It alleges the doing of the act and the procurement of the wrong from which the injury flowed.

If this was the result of malice, then there can be no doubt about the plaintiff's right to recover. Want of probable cause and malice lie at the foundation of the action, and constitute its fundamental elements. There may be even probable cause or grounds for the suit, but if from bad or malicious motives an oppressive or vexatious litigation is carried on, the party will be responsible. Malice need not be expressly proved, but may be inferred from want of probable cause, and the jury may look at all the circumstances in making up their verdict.

We will not undertake to weigh the evidence; but there was testimony sufficient to give the case to the jury. And the defendant's instructions concerning malice and want of probable cause, were all given and were fully as favorable as the law would warrant, and we can therefore not disturb the verdict on that account.

But it is objected that the damages are excessive. The jury returned a verdict in favor of the plaintiff for \$800, but at the suggestion of the court \$350 were remitted, leaving the sum of \$450, for which judgment was rendered. In this case exemplary damages were permissible, but that would not justify arbitrary damages, growing out of the caprice or prejudice of the jury. But we must see that manifest injustice has been done before we would be authorized to interfere. Ordinarily, the trial court has better opportuni-

ties to judge of what is the correct measure of damages than we have. Taking all of the circumstances into consideration the damages are not so excessive as to warrant us in setting them aside. It was shown that up to the time when the attachment was sued out and levied, defendant was doing a fair business and making a good support for his family; that in consequence of his business being interrupted he lost his boarders, and his credit was destroyed, and he was ultimately forced to sell out and quit the business in which he was engaged. The rules as to damages, applicable in cases of malicious prosecution, apply to actions for malicious attachment. Those rules are thus expressed by Greenleaf: "Whether the plaintiff has been prosecuted by indictment, or by civil proceedings, the principle of awarding damages is the same; and he is entitled to indemnity for the peril occasioned him in regard to his life and liberty, for the injury to his reputation, his feelings and his person, and for all the expenses to which he has necessarily been subjected. And if no evidence is given of particular damages, yet the jury are not therefore obliged to find nominal damages only. Where the prosecution was by suit at common law, no damages were given for the ordinary taxable costs, if they were recovered in the action; but if there was a malicious arrest, or the suit was malicious, and without probable cause, the extraordinary costs, as between attorney and client, as well as all other expenses necessarily incurred in defense are to be taken into the estimate of damages." (2 Greenl. Ev., § 456; Drake At., § 745.)

I think the judgment should be affirmed. The other judges concur, except Judge Sherwood who is absent.

---

Daly v. Butcher's and Drovers' Bank of St. Louis.

---

JOHN J. DALY, Appellant, *vs.* THE BUTCHERS' AND DROVERS'  
BANK OF ST. LOUIS, Respondents.

1. *Banks—Draft forwarded to defaulting correspondent—Responsibility of bank to owner—Measure of.*—Where a bank in this State receives for collection a draft payable in another State, and uses due diligence and forwards the draft to a proper correspondent at the place where the paper is made payable, with proper instructions for collection, its responsibility is at an end, and in case of default by its correspondent, it cannot be held liable to the owner, unless by some after act it makes itself responsible

*Appeal from St. Louis Circuit Court.*

M. Kinealy, for Appellant.

Defendant received the drafts for collection, not merely for transmission. (Bank of Washington *vs.* Triplett, 1 Pet., 25.)

It will be presumed that the bank undertook the collection for a sufficient consideration and they will not be permitted to rebut it. Gerhardts *vs.* Boatmen's Saving Ins., 38 Mo., 60; citing and approving Allen *vs.* Merchants' Bank, 22 Wend., 215; Morse Banking, 323, 2 para.

The defendant was a contractor for the collection of the drafts, and not the agent of plaintiff, and is therefore liable for the loss occasioned by the default and negligence of the Vicksburg Bank. (See Reeves *vs.* State Bank of Ohio, 8 Ohio, [N. S.], 465; Young *vs.* Noble, 2 Disney, [Ohio,] 485; Commercial Bank of Penn. *vs.* Union Bank of N. Y., 1 Kern. N. Y., 203; Commercial Bank *vs.* Union Bank, 19 Barb., 391; Montgomery Co. Bank *vs.* Albany City Bank, 8 Barb., 396.)

But even if the court should refuse to abide by the doctrine of Gerhardts *vs.* Boatmen's Saving Ins., and hold defendant the agent of plaintiffs instead of a contractor, we would be entitled to a reversal in this case because the indorsement of defendant on the back of the drafts was an order of appropriation of the proceeds, to their own use, and they thereby constituted the Vicksburg Bank their own agent, and became liable for its negligence and default. (See Tabor *vs.* Perrott, 2 Gallis., 565; see also Young *vs.* Noble, *supra.*)

---

Daly v. Butchers' and Drovers' Bank of St. Louis.

---

Moreover, the plaintiff being a depositor (customer) of defendant, even on the general doctrine of agency applied to banks, the defendant is liable in this case. (*Mackersy vs. Ramsay*, 9 Cl. & F., 844-846.)

*A. J. P. Garesche*, for Respondent.

I. The bank having used due diligence by inquiry, and exercised a sound discretion in the choice of its foreign correspondent, cannot be held liable. The nature of its agency implied its power to appoint a sub-agent. For no one can seriously suppose that it was the duty of the bank that it should send one of its own officers to Mississippi to make these several collections. (*Ætna Ins. Co. vs. Alton City Bank*, 25 Ill., 246; *Dorchester M. B'k. vs. N. E. B'k.*, 1 Cush. [Mass.], 177; *East Haddam B'k. vs. Scovill*, 12 Conn., 314. (These decisions conform with the general law of principal and agent.) *Sto. Ag.*, § 201.)

II. And the rule is reasonable. 1st. Because the contract, as contended for by plaintiff, that a bank should answer for the fidelity and solvency of a foreign corporation or person, would be beyond its corporate powers. 2nd. Because it is of very great advantage to the business community that a bank may be authorized to receive such paper for transmission and collection, without other responsibility than that of an honest discretion. *Gerhardt vs. Boatmen's Sav. Inst.* 38 Mo., 60, is not adverse. The court there says: "If the subject of the controversy were a foreign bill of exchange, it might present an entirely different aspect." See also to same effect *Allen vs. Merchants' Bank*, 22 Wend., 224.

In this State it is the rule, that in a case like the present, from the nature of the transaction, the bank has a right to employ a sub-agent. And if so, then the general law of agency applies, that the agent is not responsible if he exercise care and a sound discretion,—both of which conditions are conceded to exist, by the agreed state of facts.



---

Daly v. Butchers' and Drovers' Bank of St. Louis.

---

VORIES, Judge, delivered the opinion of the court.

The defendant in this case was a banking corporation authorized and created by the laws of this State, and as such was engaged in receiving deposits of money and securities, buying and selling exchange, and collecting drafts, bills and notes.

The petition alleges that the plaintiff, on the 19th day of October, 1867, was the owner of five different drafts drawn on different persons and firms in the States of Arkansas and Mississippi, for sums amounting to about \$150 each, (each of which was particularly described in the petition), and all of which were drawn by P. Flanigan & Co., payable to their own order and by them indorsed.

The petition also charges that, on said 19th day of October, 1867, plaintiff deposited said drafts with the defendants for collection, and that defendant agreed and undertook to collect at the current rate of exchange; that the aggregate amount of said drafts was seven hundred and thirty-two dollars and nineteen cents; that the defendant refused to account to plaintiffs for the drafts, although a reasonable time had elapsed since their delivery to defendant for collection or return, and that defendant had refused to pay plaintiff the amount of said drafts or to return the same; that defendant has collected the amount of the drafts and has thereby become liable to pay the amount thereof to plaintiff, for which judgment is prayed.

The defendant in its answer denies that it agreed to collect the drafts named in the petition, or that it refused to account to plaintiff therefor, or that it has ever refused to return the same, or that it has ever collected the amount thereof. But the defendant states that said drafts were deposited with it with the understanding that defendant would send them to Vicksburg for collection; that pursuant to said agreement defendant did send the drafts to the Vicksburg National Bank, at Vicksburg, Mississippi, for collection; that said bank has not as yet collected the same or accounted to defendant therefor. The case was tried before the court, a jury having been waived.

The case was submitted on the following agreed state of facts, to-wit: "That the plaintiff was a depositor at the defendant's bank; that the plaintiff deposited the drafts named in the petition with defendant; that said drafts were payable with current rate of exchange, and that said drafts were sent by the defendant to the National Bank at Vicksburg, Mississippi; that the National Bank was ordered by defendant to collect and remit; that said bank did collect the following sums, to-wit: Draft on T. F. Mann, for \$144.57, on November 2, 1867; Rosenberry & Co., for 149.76, October 22, 1867; L. Morrow, for 128.36, November 5, 1867; that the National Bank at Vicksburg kept the money and failed to remit, and became insolvent; that the Butchers' and Drovers' Bank at St. Louis never received the money collected on said drafts at St. Louis; that the Butchers' and Drovers' Bank has never returned to plaintiff any of the other drafts, nor has said bank ever paid any part of said drafts to him, though the same have been demanded; that the cashier of the Butchers' and Drovers' Bank at St. Louis was P. S. Langton, and that the cashier of the National Bank at Vicksburg was Alex. H. Arthur, and that upon the back of each of said drafts in question the defendant made the following indorsement: "Pay to Alex. H. Arthur, Esq., cashier, or order, for collection for account of Butchers' and Drovers' Bank of St. Louis, P. S. Langton, cashier." It is further admitted that the defendant made inquiries as to the solvency of the National Bank, and became satisfied that it was perfectly safe and sound, and so believed to be at the time the drafts were sent for collection.

Upon this admitted state of facts the Circuit Court, at special term, found for the defendant and rendered a judgment in its favor. The plaintiff then filed a motion for a new trial on the ground that the judgment was not sustained by the law growing out of the facts in the case. This motion being overruled by the court, the plaintiff excepted and appealed to the general term of said court, where the judgment rendered at special term was affirmed, from which last judgment plaintiff appealed to this court.

There is no difficulty in reference to the facts in this case; all of the material facts stand admitted. The question is as to the law growing out of the facts admitted. The plaintiff being the owner of certain drafts drawn on certain persons in the States of Mississippi and Arkansas, and being a customer of the defendant (a bank in St. Louis, Mo.), deposited these drafts with the defendant for collection. The defendant forwarded the drafts to the National Bank at Vicksburg, in the State of Mississippi, for collection. The drafts were indorsed by the cashier of defendant to the cashier of the National bank at Vicksburg, for collection for account of Butchers' and Drovers' Bank of St. Louis. The Vicksburg bank collected part of the drafts and shortly afterwards failed and became insolvent without ever paying or otherwise accounting to defendant for the money collected or the drafts uncollected. There is no pretense that the defendant had not used due diligence in selecting the Vicksburg bank as a collecting agent, it being solvent at the time the drafts were forwarded. After the Vicksburg bank became insolvent, the plaintiff demanded the money collected by the Vicksburg bank and the drafts uncollected, of the defendant. The defendant failed to pay the money or deliver the drafts, and the plaintiff commenced this action to recover the amount thereof.

The question is, is the defendant liable for the amount of these drafts in this action, or, in other words, was the Vicksburg bank the agent of the plaintiff for the collection of these drafts, or was it the agent of the defendant? This has for a long time been a vexed question in the commercial world, the decisions on the subject being conflicting both in England and in this country. In the State of New York, although the decisions on the subject have not always been entirely consistent, it is now well settled that, where a bank in that State receives for collection a draft payable in another State, and forwards the draft to a correspondent in the place where the draft is payable, the bank receiving the draft for collection is responsible to the owner; that such correspondent is the agent of the bank transmitting the draft, and not the sub-agent of

the owner of the draft. (*Allen vs. Merchants' Bank*, 22, Wend., 215; *Commercial Bank vs. Union Bank*, 1 Kern., 203). And the same rule is adopted in the States of Ohio and Indiana, and perhaps in some other States. (*Reeves vs. The State of Ohio*, 8 Ohio St., 465; *American Express Co. v. Haire*, 21st Ind., 4).

The case of *Taber vs. Perrot*, (2d Gallison, 565,) relied on by the plaintiff in this case, I think is distinguishable from the cases before cited. In that case the money had been collected by the correspondent to whom the bill or draft had been sent, and had been paid out to the order of the party who had transmitted the bill or draft without notice of the interest of the real owner. In such case there can be no doubt but the party who transmitted the bill and converted the funds, and not the correspondent who collected the money, would be liable to the real owner.

In the States of Massachusetts, Pennsylvania, Connecticut, Illinois, and in several other States, the decisions are in direct conflict with those in New York and Ohio before referred to. In the case of *Bellemire vs. Bank of United States*, (4 Wharton, 105), it was held that the bank should be regarded as having undertaken to collect the note in the customary mode, and the holder of the note must be understood to have consented to the arrangement; consequently on default of payment by the maker, it became the duty of the bank to call to its aid the notary and intrust him with the performance of that which was necessary to secure the responsibility of the indorsers; that the notary being a public officer, he and his sureties on his official bond were liable to the parties injured by his neglect or misconduct, and not the bank or person who directly employed him.

In the case of the *Dorchester and Milton Bank vs. The New England Bank*, (1 Cushing, 177,) it was held that a bank by which notes and bills payable at a distant place are received for collection, without specific instructions, is bound to transmit or cause them to be transmitted, by suitable sub-agents, to some suitable bank or other agent at the place of payment for the

purpose; and where suitable sub-agents are employed in good faith, the collecting bank is not liable for their neglect or default. And to the same effect is the case of *Warren Bank vs. Suffolk Bank* (10 Cushing, 582); *East Haddam Bank vs. Scovil*, (12 Conn., 303). And to the same effect is the case of the *Bank of Washington vs. Triplet & Neale*, (1 Peters, 25,) and I might refer to many other cases to the same effect. These cases are not all exactly alike in reference to their particular facts, but the principle involved is deemed to be the same. They are governed by one general idea, which is, that it is the universal custom and habit for banks which receive notes and drafts for collection, the payer of which resides at a distance, to transmit the same to some bank or agency at the place of payment, and that therefore, when the holder of a bill or draft in such case deposits the same with a bank for collection, without instructions to the contrary, he is presumed to do so with reference to such usage and to authorize the bank to transmit the bill or draft accordingly. And when the collecting bank uses due diligence and good faith in selecting a correspondent or bank at the place of payment, to whom the bill or draft is transmitted, it has discharged its whole duty, and this, notwithstanding the draft is indorsed to the agency to which it is transmitted, for collection on account of the collecting bank. Of course in such cases if the bank or other agent, to whom the draft was transmitted, should collect the draft and pay over the proceeds to the first bank or to its order without notice to the contrary from the real owner, the bank to which it was transmitted would be discharged from further liability, and the first bank with which the bill was deposited would be liable to the owner for the proceeds.

In the case of the *Ætna Insurance Company vs. The Alton City Bank*, (25 Ill. 243,) which was a case involving the question in the present case, the learned judge delivering the opinion of the court uses this language: "Where a bank receives a bill or note for collection against a drawee or maker resident at the place of the bank, or where the bank undertakes for its collection by their own officers, there can be no doubt that it



would be liable for any loss that might result from neglect. But when received for transmission, it has fully discharged its duty by sending the instrument in due season to a competent, reliable agent, with proper instructions for its collection. This is manifestly the rule clearly announced in a large majority of the adjudged cases. And whatever might be our impression if the case were one of first impression, we regard the rule too well and firmly established to feel ourselves at liberty to disturb it."

"In this case it appears the defendant received the bill in controversy for transmission for collection, and in due season forwarded it to their correspondent at the residence of the drawees; that they were competent and reliable, and that defendants in no way contributed to any loss that may have occurred. If then any liability has been incurred to the plaintiff, it is by the St. Louis house, who became their agents, and not by the defendants."

The direct point involved in this case has never, so far as I know, been before this court. In the case of *James H. Millikin vs. August F. Shapleigh*, (36 Mo., 596,) the plaintiff, the holder of two drafts, deposited them with a bank in Baltimore "for collection;" the bank in Baltimore indorsed the drafts and sent them to a bank or association in St. Louis for collection as their agents. The indorsements were expressed to be "for collection;" but the association in St. Louis had no actual knowledge at the time the drafts were received that the plaintiffs were the owners of the drafts. The drafts were paid, when due, to the association in St. Louis, and the St. Louis house having an unpaid account against the bank at Baltimore, who had then become insolvent, credited the proceeds of the drafts to their account against the Baltimore bank, with which it had had previous dealings. The plaintiffs after this notified the association at St. Louis that they were the owners of the drafts and their proceeds. The plaintiffs demanded the proceeds of the drafts, which were not paid, and the suit was brought for their recovery. The court held that the plaintiffs could recover notwithstanding the drafts were



---

Daly v. Butchers' and Drovers' Bank of St. Louis.

---

expressly indorsed in full "for collection" to the association at St. Louis. This decision, although not exactly in point, seems to recognize the fact that the association at St. Louis was the agent of the owner of the drafts and not merely the agent of the bank in Baltimore to which the drafts had been delivered. If the association at St. Louis had advanced money on the drafts or paid for them, to the bank in Baltimore in the usual course of trade without notice of the plaintiff's title, the decision would of course have been for the defendant.

The case of *Gerhardt vs. Boatmen's Savings Institution*, decided by this court (38 Mo., 60) is relied on by the plaintiff as authority in this case. In that case the plaintiff kept a regular deposit account with defendant, and in accordance with the uniform custom delivered to it a negotiable promissory note for collection. The payer of the note and the defendant both were in St. Louis; the plaintiff indorsed the note and delivered it to defendant for the purpose aforesaid. The note was not paid at maturity, and was delivered by the defendant to a notary public for protest, and to give notice of presentment and refusal to pay to the indorser. The notary was appointed by the defendant to do all of its notarial business, and had given defendant a bond in the sum of ten thousand dollars for the faithful discharge of his duties; and, in fact, the notary was in one sense, an officer of the bank. By his negligence, the plaintiff lost all remedy against the indorser of the note, and the maker was insolvent. The court held that the plaintiff could recover. The conflicting authorities were examined in the opinion delivered in the case, but the decision was placed on the express ground that the notary, through whose fault the plaintiff sustained the injury, was the agent and officer of the defendant, and was acting in the course of his employment. The learned judge delivering the opinion of the court, used this language: "The defendant having appointed the notary by the year, and required a bond for the faithful performance of his duties, made him its agent and an officer of the bank. Upon recognized

---

Daly v. Butchers' and Drover's Bank of St. Louis.

---

and general principles, the principal is held "liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them." (Story's Agency, § 452.) This case is consistent with the decision in the case before referred to in 25th Illinois Reports, and is undoubtedly the law. The facts of the case show that the defendant and the payer of the note both resided in the same city, and that it could not have been contemplated by the plaintiff that any sub-agent should be employed in the collection of the note, but that it must have been contemplated that the defendant and its own immediate agents would perform all of the duties necessary to be performed in the collection of the note, and it is wholly unlike a case where a note is deposited with a bank for collection, when the payer of a note resides in a city or state different from where the bank is situate. In the last case it must be contemplated that the note or draft will be transmitted in the usual course of business to a correspondent where the payer of the bill or draft resides, and in such case, although the authorities as we have seen are conflicting on the subject, we think that the weight of the authorities is to the effect that where the bank with which the bill or draft is placed or deposited for collection, uses due diligence and transmits the paper to a proper correspondent for collection, with proper instructions for the collection of the same, its responsibility is at end, unless by some after act it makes itself responsible. In the case under consideration, if the defendant after receiving the drafts for collection had failed to transmit them to a proper and competent correspondent or agent, and at a proper place to facilitate their collection, and the plaintiff had sustained loss thereby, the defendant would doubtless be liable to plaintiff for said loss; but we have no such case before us.

The judgment of the Circuit Court will be affirmed. The other judges concur.

---

 Strassheim v. Jerman.
 

---

JACOB STRASSEHEIM, Respondent, *vs.* OCTAVIA E. JERMAN, Appellant.

1. *St. Louis—Street improvements—Unexecuted contracts for—Ordinance validating—Acceptance of, etc., etc.*—Under § 9 of the Act of March, 1867, amendatory of the charter of St. Louis, (Sess. Acts 1867, p. 73,) it was competent for the city, where a contract entered into under a certain ordinance remained unexecuted, to adopt and approve such contract by an amendatory ordinance on condition that the contractors would file their written acceptance of the latter ordinance. Such adoption and approval were within the meaning of the above section of the charter a "providing by ordinance" for the performance of the work which had been contracted for.
2. *Street Improvements—Ordinance touching—Completion of—Specification as to time of.*—An ordinance authorizing a City Engineer to make certain street improvements is not invalidated by reason of its failure to specify the time within which the work shall be done.
3. *Special tax-bills—Personal and general judgment on.*—In suit on a special tax-bill, the rendition of a personal or general judgment against defendant is error.

*Appeal from St. Louis Circuit Court.*

*S. N. Taylor & Hamilton Moore*, for Appellant.

I. Special ordinance No. 6,583, fails to specify the time within which it should be performed. Time is of the essence of contracts of this character.

Fixing the time is a part of the legislative power, can only be exercised by the City Council, and cannot be delegated. (See *Ruggles vs. Collier*, 43 Mo., 365; *Thompson vs. Schermerhorn*, 6 N. Y., [2 Seld.,] 92; *City of East St. Louis vs. Wehrung*, 50 Ill., 28.)

II. An ordinance can have no retrospective operation upon a previous contract entered into for building sewers or improving streets. (*St. Louis vs. Oeters*, 36 Mo., 456; *Howard vs. Corporation of Savannah, Charlt.*, 173.)

*E. C. Kehr*, for Respondent.

I. Ordinance 6,583 will admit of but one construction as to the time when the work was to be done; it instructs the City Engineer to cause it to be done *i. e.*, to have it done forthwith. (*Sheehan vs. Gleeson*, 46 Mo., 101; § 1, Art. 3, Ordinance No. 5,399.)

II. By ordinance 6,962 the council merely re-affirmed contracts previously and validly made, to which there can be no objection. The amendatory ordinance is valid. (City to use of Fox vs. Schoeneman, 52 Mo., 348.)

III. Respondent having proved the execution and delivery to him of the special tax bill, had made out a *prima facie* case.

SHERWOOD, Judge, delivered the opinion of the court.

Action on a special tax bill for curbing, guttering and macadamizing Caroline street and paving the cross-walks thereof, in front of the property of defendant, situate in city block No. 1,275. An ordinance, No. 6,583, was approved July 3rd, 1868, by the first section whereof the city engineer was "authorized and instructed to cause" said street between two given points, "to be graded, curbed, guttered, macadamized and the cross-walks and side-walks to be paved." The contract for the performance of the above mentioned work was entered into July 31st, 1868, and the dimensions and manner of such work were duly set forth therein; the grading to be paid for by the city, and the residue of the work by special tax-bills assessed against property owners. Before however, any of such work constituting a charge against such owners was performed, the city by a supplementary ordinance No. 6,962 approved June 29th, 1869, amended ordinance No. 6,583 and a number of others of like sort. The amendatory ordinance declared all contracts yet remaining unfulfilled, which had been made under such former ordinances, valid and binding, upon condition that the contractors would file their written acceptance of such amendatory ordinance with the city engineer, &c.,—as was done in the present case,—on the 10th of July, next succeeding the passage of the ordinance referred to. By the terms of her charter (§ 9, p. 73, Laws 1867,) the city was empowered through her council, \* \* \* \* "to cause the construction \* \* \* \* of all streets, alleys and public highways within the city, at such time and to such extent, and of such dimensions and material, and in such manner and under such general regulations, as may

be provided by ordinance." Under and by virtue of the statutory provisions just cited, it was perfectly competent for the city, where a previously made contract remained unexecuted, to adopt and approve such contract in the way hereinbefore mentioned; and such adoption and approval upon the conditions specified in the amendatory ordinance No. 6,962, were within the meaning of the foregoing section of the charter, a "providing by ordinance" for the performance of the work which had been contracted for, and the contract of July 21st, 1868, was to all intents and purposes, therefore, a contract made and entered into for the first time July 10th, 1869, when the written acceptance of plaintiff was filed with the city engineer. The fact that a general ordinance (No 5,399) was in existence, providing a specific mode by which the approval of the Common Council of all contracts was to be expressed, did not in any way tend to prevent the adoption of a different method, by subsequent ordinance, for giving like expression to legislative approval; for as a matter of course, the same power which ordained the exactment of the one ordinance still existed when the second was approved. It was a matter of no importance that ordinance No. 6,583, specified no time at which the work on Caroline street was to be done. This was so ruled in the case of Carlin vs. Cavender, (decided at the present term) in which we held that a similar ordinance conferred on the city engineer a "present authority," and was sufficiently explicit as to the particular referred to. As the defendant offered no evidence whatever, and as the tax-bill is made by law *prima facie* evidence of its recitals, it only remained for the court to render judgment in behalf of the plaintiff. But the form of that judgment is under decisions heretofore made by us, open to criticism.

That portion of the judgment, which is personal or general in its character, will be reversed, and that portion of such judgment which looks to the enforcement of a lien against the property will be affirmed.

The other judges concur.

STATE OF MISSOURI, *ex rel.*, H. CLAY EWING, ATTORNEY GENERAL, Relator, *vs.* CHAS. P. TOWNSLEY, Respondent.

1. *Elections—Official returns—Governor and Secretary of State cannot go behind.*—In counting votes for a Circuit Judge, neither the Governor nor the Secretary of State have any authority to go behind the returns officially certified to the Secretary.

2. *Quo warranto—Change of venue—Application for, to what court addressed, etc.*—Where in *quo warranto* the issues of fact are ordered by the Supreme Court to be tried in a specified county, application for change of venue made to the court of that county is properly overruled. Any objections to the venue should in such case be addressed to the Supreme Court.

The general law touching change of venue has no application to such a case.

3. *Quo warranto—Circuit Judge—Returns of election, correctness of issues touching.*—In *quo warranto* on the relation of the Attorney General to test the title of a Circuit Judge to his office, defendant averred generally that he was duly elected. Plaintiff's replication set out specifically the returns from the counties comprising the circuit, and charged that the returns from a certain county had been excluded from the count. Defendant's rejoinder was a general denial of the averments of the replication—nothing more; *held*, that the correctness of the returns was not put in issue by the pleadings, and could not be enquired into.

In *quo warranto*, parties cannot go behind the official returns, unless the specific objections thereto be stated in the pleadings; there must be, *e. g.*, a specification of the number and names of the voters alleged to be illegal; general averments in reference thereto are insufficient.

4. *Quo warranto—Supreme Court—Common law.*—In the State of Missouri, pleadings in *quo warranto*, in the absence of any statute, are governed by the common law.

5. *Quo warranto—Defendant's title to be tested under—Plaintiff's right determined incidentally, when.*—The primary and fundamental question, in a proceeding in *quo warranto*, is whether the defendant is legally entitled to hold the office, and not as to the rights of any other person who may claim it. Where the information is on the relation of one who himself claims to have been elected, his rights may incidentally have to be determined, but not where the proceeding is instituted by the State.

*Information in nature of a Quo Warranto.*

R. E. Rombauer & Geo. D. Reynolds, for Defendant.

The returns and abstracts in the County Clerk's Office were not conclusive but only *prima facie* evidence, and the defendant should not have been forbidden to go behind them.

That defendant's position is correct, will appear from the following authorities and uniform adjudications on this subject



---

 State, *ex rel.* v. Townsley.
 

---

in this and other States ; (Cooley, Const. Lim., 3d ed., § 623 ; Mayo vs. Freeland, 10 Mo., 630 ; State, *ex rel.* Bell vs. Harrison, 38 Mo., 540 ; State vs. Rodman, 43 Mo., 256 ; Brown vs. Hixon, 45 Mo., 340 ; State *ex rel.* Att'y Gen. vs. Steers, 44 Mo., 225 ; State, *ex rel.* Att'y Gen. vs. Vail, 53 Mo. 225 ; People vs. Van Slyck, 4 Cow., 297 ; People vs. Ferguson, 8 Cow., 102 ; People vs. Vail, 20 Wend., 12 ; People vs. Seaman, 5 Denio, 409 ; People vs. Cook, 8 N. Y., 67 ; Attorney General vs. Barstow, 4 Wis. 567, 792 ; Attorney General vs. Ely, 4 Wis., 420 ; State, *ex rel.* Gates vs. Felter, 12 Wis., 566 ; State, *ex rel.* Field vs. Avery, 14 Wis., 122 ; People, *ex rel.* Att'y Gen. vs. Tisdale, 1 Dougl., 59 ; People vs. Higgins, 3 Mich., 233 ; Dishon vs. Smith, 10 Iowa, 211 ; People, *ex rel.* vs. Matteson, 17 Ill., 167 ; Taylor vs. Taylor, 10 Minn., 107 ; People vs. Jones, 20 Cal., 50 ; Calaveras County vs. Brockway, 30 Cal., 325 ; State vs. Johnson, 17 Ark., 407 ; Wammack vs. Holloway, 2 Ala., 31 ; Marshall vs. Kerns, 2 Swan, [Tenn.] 68).

NAPTON, Judge, delivered the opinion of the court.

This is a proceeding by the State, through the Attorney General, by way of information in the nature of a *quo warranto*, to try the right of defendant to the office of judge of the sixth judicial circuit.

The defendant, by way of plea, set up that he was duly elected on the first Monday in November, 1868 ; that within due time the Secretary of State, in the presence of the Governor, opened the returns and cast up the votes given in the counties composing said circuit, and that said Secretary certified to the Governor that said defendant had received the highest number of votes at said election ; and thereupon the Governor issued a commission to said defendant for six years, etc.

To this plea or answer there was a replication denying all the facts stated in the plea, and then specifically alleging the facts to be as follows : That at said November election there were two candidates for circuit judge of the sixth circuit, to-

wit : the defendant and one William T. Wood ; that said circuit was composed of the counties of Cass, Johnson, Pettis, Saline, Lafayette and Jackson ; that at said election said defendant received 6656 votes, and the said Wood, 6912 votes ; that in fact, the vote in Cass county for defendant was 1014, in Johnson county, 1374, in Pettis county, 957, in Saline county, 584, in Lafayette county, 901, and in Jackson county, 1429, in all 6078 ; that Wood received in Cass county, 1158 votes, in Johnson county, 937, in Pettis county, 830, in Saline county, 392, in Lafayette county, 556, in Jackson county, 3039, in all, 6912 votes. The plaintiff avers that the returns of all said votes so cast were duly made to the Secretary of State, in due time and manner ; that it was the duty of said Secretary to open said returns in presence of the Governor, &c., and cast them up, and give to the candidate having the highest number of votes a certificate of his election, but that said Secretary did not open the returns from Jackson county as provided by statute, but refused to do so, whereby said Wood was deprived of the benefit of 3039 votes given to him in said Jackson county, and that said certificate in favor of defendant was fraudulent and false, and further, that said returns from Jackson county in said Secretary's office are lost or destroyed.

The rejoinder merely denied in a variety of forms the specific allegations of the replication and repeated the statement in the plea.

The defendant demanded a jury to try the issues of fact made by the pleadings, and the parties not being able to agree on the county to which the case should be sent, this court ordered the case to Jackson county to have the issues determined. These issues were : First, did the Clerk of the County Court of Jackson county send the Secretary of State, at Jefferson City, an abstract of the returns of the election held in November, 1858, in Jackson county, including the election of circuit judge for the sixth judicial circuit, by mail or otherwise? Second, did returns of the election exist from which said abstract was made? Third, did the Secretary of State re-

---

State, ex rel. v. Townsley.

---

ceive said abstracts at his office by mail ? Fourth, if such abstract was not received by the Secretary of State, did he send a messenger for such abstracts at any time within forty days from the time of the election ? Fifth, who were candidates for circuit judge at that election, as indicated by the returns, and what number of votes did each receive, according to the returns or abstract ? Sixth, did the Secretary of State include the vote of Jackson county in counting the votes for the candidates for the office of judge of the circuit court at the election in November, 1868 ?

On December 1, 1873, the case came up for trial in the Circuit Court of Jackson county, and the defendant applied for a change of venue, on the ground of the prejudice of the inhabitants of said county against him, which was overruled. This application was supported by the affidavit of the defendant. An application was then made for a continuance, on account of the absence of Thomas C. Fletcher and Francis Rodman, material witnesses for the defendant, which motion was also overruled, but the defendant was allowed ten days in which to procure the testimony of said Rodman and Fletcher.

At the expiration of the ten days, the case was again called. and the State, through the Attorney General, proceeded with the testimony, and no evidence whatever was offered by the defendant, and the jury returned the following verdict :

First—That the Clerk of the County court of Jackson county did send to the Secretary of State such abstract by mail.

Second—That returns of the election from which said abstract was made, did exist.

Third—That the Secretary of State did receive said abstract at his office by mail.

Fourth—That said abstract was received, and that the Secretary of State did not send such messenger.

Fifth—That C. P. Townsley and W. T. Wood, were candidates for circuit judge at said election ; and that the said C. P. Townsley received at said election, 1429 votes ; and the said W. T. Wood, received 3039 votes, according to the returns and abstract.

Sixth—That the Secretary of State did not include the vote of Jackson county in counting the votes for the candidates for the office of judge of the Circuit Court, at the election in November, 1868.

The evidence on the trial of these issues was altogether one way. The depositions of Governor Fletcher and the Secretary of State, Rodman, and the present Secretary, Weigel, and the clerk and deputy clerk of Jackson county, all established, without the least contradictory evidence, that the returns from Jackson county of the election in November, 1868, were duly made out and an abstract of them forwarded to the Secretary of State, and were duly received by said Secretary; and were not counted by these officials in declaring the results and giving the commission of judge of the sixth circuit to defendant; and that these returns from Jackson county, if counted, would have given the office to Wood, by about nine hundred majority.

As we have already decided in the case of State vs. Vail, (53 Mo., 97,) and in various other cases cited in that opinion, that neither the Governor or Secretary of State, had any authority to go behind the returns officially certified to the Secretary, it follows that the commission to the defendant was illegal and void, and that a judgment of ouster must necessarily follow.

But as an elaborate argument has been made to show that some of the positions taken in the Vail case are not in conformity to the views entertained in other States, in regard to the extent to which courts may go in cases of *quo warranto*, a few observations may not be amiss to state more specifically what was decided then and what we adhere to now.

Preliminary to this point, however, we may here state, that the application for a change of venue made in the Circuit Court of Jackson county was properly overruled. The issues of fact were ordered to be tried in that county by this court, and any objections to the venue should have been addressed to this court. No objections were made here and the general law in relation to change of venue has no application to this case.

---

State, ex rel. v. Townsley.

---

And the motion for a continuance was properly overruled, and whether properly or not, it is manifest that the time given by the court to procure the testimony of the absent witnesses was sufficient, since, in the trial of the issues, their testimony was read, though not by the defendant.

It is now urged that the defendant was not allowed, by the issues made up by this court, to go behind these turns and abstracts of Jackson county (this being the only county concerning which there was any dispute) and show that these returns and abstracts were false, and that the defendant was duly and legally elected. This, of course, could only be done by proving that the sixteen hundred and ten voters, who constituted the majority for defendant's competitor in that county, were illegal voters, or never voted, or that the competitor was disqualified for holding the office.

It would be a sufficient answer to this, that no such issue was made by the pleadings. There is a general averment in the return or plea that the defendant was duly elected; but the replication is specific, stating the returns from the counties composing the circuit and asserting that the returns from Jackson county were excluded from the count on which the defendant was commissioned. There is no rejoinder putting in issue the correctness of these returns. It simply denies the averments of the replication.

The mere allegation in the plea that the defendant was elected amounts to nothing, and the denial of that allegation makes no issue. It would be equivalent to the plea of not guilty in an action of trespass or trover at common law, but our code of practice requires the real defenses to be set out. Certainly, if we are to give the liberal construction claimed for a trial on an information in *quo warranto*, and allow parties to go behind the returns of the officers appointed by the State, the specific objections to the returns must be stated, so that the ground on which they are disputed may be understood.

The decisions in other States, in which it seems an information in the nature of a *quo warranto* is regarded as a mere case of a contested election, are not authoritative here. The

statutes of such States may have authorized such conclusions. We have no statute here in relation to such proceedings in the Supreme Court, and we have been governed by the common law of England. Under that we have held that the qualifications of electors could not be inquired into, in a *quo warranto*, unless there was no other means for such investigation provided.

It seems now that in 1868, the act for contesting the election of Circuit Judges was subsequently pronounced unconstitutional, and therefore it is insisted that in the present information such defenses should be allowed.

We answer to this, so far as this case is concerned, that no such issue was made by the pleadings, and of course no evidence was offered to establish such defense. Whether such defense could be offered in an information, under the statute of Anne in the Circuit Court, in which a relator contesting a right to the position is made a party, is not necessary to be decided; nor is it necessary to decide that it could not be offered in this court, where the pleadings present such an issue.

The question is a mere abstraction in this case. It is only by implication that it could be inferred that the defendant meant to dispute the validity of the returns made by the clerk of Jackson county, or to question the right of the voters, or the eligibility of the candidate voted for. Certainly, if we mean to let in such evidence in a *quo warranto*, there must be a specification of the number of voters alleged to be illegal, and of their names, and of the disqualification of the competing candidate, if such are asserted. A mere general averment of an election is insufficient. The opposite party could not infer from such an allegation that there was any intention to go behind the returns, which, *prima facie*, are binding on the courts as well as on the executive officials.

The primary and fundamental question in a proceeding by *quo warranto*, is whether the defendant is legally entitled to hold the office, and not as to the rights of any other person who may claim it. Where the information is upon the rela-



---

State, ex rel. v. Townsley.

---

tion of one who himself claims to have been elected, his rights may incidentally have to be determined, but not where the proceeding is instituted by the State. In the former case, if there is no other mode of contesting the election, provided by the legislature, it may be that the court would allow the proceeding to assume the latitude claimed here, or it may be, that in this court and in a proceeding instituted by the Attorney General, such defenses would be available. It is unnecessary to decide either point in this case. There can be no question on the facts as found by a jury, that the commission to the defendant was illegal; that neither the Secretary or the Governor had any power to set aside the official returns duly and legally filed in the office of Secretary of State. As these returns indicated that the defendant lacked about nine hundred votes of being elected, it would seem to be a very unfounded inference that the court, in declaring the invalidity of his commission, was disposed to disregard the will of the people of the circuit, by refusing his claim, now asserted for the first time, to attack the validity of the official returns, upon a general allegation of his election. No such issue was made, nor could any such issue have been framed on the pleadings.

Our conclusion is therefore, that the defendant was not entitled to his commission as judge of the Sixth Judicial Circuit, on the official returns filed in the office of Secretary of State. If these returns are false, the defendant is not without his remedy. Their falsity has not been asserted in this case, nor has any attempt been made to prove them false, nor any plea of their falsity been offered.

We shall order a judgment of ouster. The other judges concur. Judges Wagner and Sherwood absent.

---

Meyers v. Van Wagoner.

---

JOHN MEYERS, Respondent, vs. ADALINE H. VAN WAGONER  
*et al.*, Appellants.

1. *Notes—Surrender, etc.—Consideration.*—The surrender and cancellation of a note is a sufficient consideration for another given in lieu thereof.
2. *Married woman—Separate estate, etc.*—As to her separate estate, a married woman is *feme sole*.
3. *Married woman, note of—Binds separate estate, when.*—The delivery of her note by a married woman, raises the presumption that she intends to bind her separate estate.

*Appeal from St. Louis Circuit Court.*

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery to subject the separate property of the defendant, Adaline H. Van Wagoner, to the payment of a promissory note which she had executed and delivered to the plaintiff.

The petition alleges that she is the owner of certain real estate situate in the City of St. Louis, and described in the petition, and that it is held by the defendant, John M. Krum, in trust for her sole and separate use; that she and the defendant Garret S. Van Wagoner are husband and wife, and were so at the time of the execution of the note; that she executed and delivered the note in suit, and intended thereby to bind and did bind her separate estate for its payment, and prays judgment for the amount of the note, and that it be enforced against her separate property described in the petition. The answer denies the material facts alleged in the petition, and the defendant Adaline H. Van Wagoner in a separate answer alleged that the note in suit was made without any consideration, and that it was merely voluntary, and that she did not bind nor intend to bind her separate property for its payment. The plaintiff by replication denied the new matter contained in the answer. The plaintiff had judgment at Special Term, which was affirmed by the General Term, and the defendants have appealed to this court.

The facts as developed on the trial appear to be; that the plaintiff held the note of Adaline H. Van Wagoner's son by a

former marriage, for loaned money; that this son was wholly insolvent; that the plaintiff applied to Mrs. Van Wagoner to assume the debt, which she did by executing her own note for the same, and taking up and destroying her son's note; that plaintiff held this note for some time, when she renewed it by giving the note in suit with an extension of time of payment. Nothing was said by either party in regard to her separate property when she executed the notes referred to. She testified, on the trial, that she did not intend to bind her separate property by assuming the debt and giving her own notes for it. But there was no proof that anything at all was said about her separate property at the time of executing either note. It was admitted that the real estate described in the petition was and still is her separate property.

The point that the note sued on was voluntary and without consideration was not sustained by the proof. The surrender and cancellation of her son's note was a sufficient consideration for the note she executed. If the first note was good, the second note in renewal was certainly good, as it was supported by the same consideration, and also by the further consideration of the extension of time.

As a general proposition the contracts of a married woman are of no validity except as in regard to her separate property. In regard to such property she is treated as a *feme sole*. (Metropolitan Bank vs. Taylor, 53 Mo., 444.) If she gives a note the law implies, in the absence of proof to the contrary, that she intends to bind her separate property. Unless such was the intention, her act would be utterly void. Therefore, in the execution of a promissory note, it must be inferred that she intended it as a valid act and as binding on her separate property. Whether she could give a note, and by outside declarations made at the time, and not embodied in the note, control the intention which the law implies from the act itself, is a question upon which we express no opinion, as it is not involved in this record.

Let the judgment be affirmed. Judge Sherwood absent, the other judges concur.

---

Bartholow, et al. v. Campbell, et al.

---

THOMAS J. BARTHOLOW, *et al.*, Respondents, *vs.* THOMAS CAMPBELL, *et al.*, Appellants.

1. *Practice, civil—Continuance—Granting of, left to discretion of court, etc.*—The continuance of a cause rests very much in the sound discretion of the court, and the exercise of such discretion will be presumed to be sound and proper. Unless it plainly appears from the record that the discretion has been unsoundly or oppressively exercised, the Supreme Court ought not to interfere.
2. *Practice, civil—Pleading—Allegations taken as true, when, etc., and as to whom.*—Under the Practice Act (Wagn. Stat., p. 1019, § 36) facts not controverted in a previous pleading are to be taken as true in favor of the party pleading them, not as a matter to be submitted to and found by the jury. But they are taken as true as a matter of law to be declared by the court. But the failure of plaintiff to reply to a defense set up in the separate answer of one defendant is no admission of such defense as to the other defendants not setting it up.

*Appeal from St. Louis Circuit Court.*

VORIES, Judge, delivered the opinion of the court.

This action is founded on a negotiable promissory note executed by the defendants, Hays and Campbell, for the sum of \$2,500.00, payable to the defendant, Thurmond, and by him indorsed for value to the plaintiffs before maturity. The petition is in the usual form. The defendant Thurmond filed no answer. The other defendants each filed separate ones. Eliza T. Hays in her answer admitted the execution of the note sued on, but charged that the consideration of the note was money advanced to defendants, Thurmond and Campbell; that she signed the note at the request of the other defendants, and for their accommodation; that they procured her name to the note by fraud (setting forth the fraud), and that plaintiffs had notice of the fraudulent manner in which her name had been procured to the note at and before the time they purchased, or discounted the note.

The defendant Campbell in his answer set up substantially the same circumstances of fraud set up by defendant, Hays, except that he charged that he had been imposed on by Thurmond, and was only surety on the note for accommodation of Thurmond who received the entire consideration of the note, while Mrs. Hays charged that she had been de-

frauded by the combined fraud of Campbell and Thurmond. Defendant, Campbell, also charged that plaintiffs had notice of the fraud at the time that they discounted the note. The plaintiffs filed a replication to the answer of Mrs. Hays; but made no replication to the answer of Campbell.

When the case was called for trial the defendant, Hays, filed an affidavit for a continuance of the cause on the ground of the absence of one Mrs. Thurmond, who, it was stated in the affidavit was a married woman, and who had been sick, confined to her bed for ten days before the time for the trial and could not attend, and whose evidence was material for the defendant. This application for a continuance was overruled by the court, and the said defendant excepted.

A default was then taken as to defendant Thurmond, who had not answered, and the trial proceeded before the court.

After the evidence was closed on the part of the plaintiff, the defendant, Hays, offered in evidence the answer of defendant, Campbell, to which no reply had been filed, as evidence to prove the facts of fraud charged in her separate answer, which facts had been denied by the reply to her answer. This evidence was rejected by the court, and said defendant again excepted. No other evidence being offered, the court found for defendant Campbell on the pleadings, and rendered a judgment in favor of the plaintiffs, against the other defendants, for the amount of the note sued on and interest. The defendant, Eliza T. Hays, then filed her motion for a new trial, which being overruled she again excepted, and appealed to the General Term of the St. Louis Circuit Court, where the judgment rendered at Special Term was affirmed, from which last judgment defendant appealed to this court.

The first point presented by the defendant for the consideration of this court is, as to the propriety of the ruling of the Circuit Court in overruling the motion made by the defendant for a continuance of the cause. The continuance of a cause by the trial court is generally very much in the sound discretion of the court. Every intendment in such cases should be in

---

Bartholow, et al. v. Campbell, et al.

---

favor of the sound and proper exercise of said discretion, and unless it plainly appears from the record that the discretion of the court has been unsoundly or oppressively exercised this court ought not to interfere. (*State vs. Max Klinger*, 43 Mo. 127; *King vs. Pearce*, 40 Mo., 222.)

The affidavit in this case shows that the absent witness resided in the city of St. Louis where the trial was had; that she had been sick for ten days before the day of the trial and confined to her room; that this fact was known to the defendants; that defendant did not know until the last two or three days that the absent witness would not become able to attend the trial; that no witness in attendance, or whose presence could then be procured in time, could prove the same facts expected to be proved by the absent witness; but it nowhere appears in the affidavit that there were not others, who were not in attendance, who could prove the same facts. On the contrary, it is plainly inferable from the affidavit that there were such other persons, and it does not appear that any effort had ever been made to procure any such evidence, during the ten days after the witness named in the affidavit was known to be sick, or within the three days after which it was known to the defendant that the absent witness would not be able to appear at the trial. The defendant seems to have remained wholly inactive until the case was called for trial, and the presumption is not negatived in the affidavit, that the application was made for delay or vexation. The deponent is required to show some diligence in such cases. In the absence of diligence on the part of the defendant to avail herself of every means in her power to get ready for trial, this court will not be authorized to reverse the judgment on the ground that the court trying the cause has unsoundly exercised its discretion in the premises. (*Cline & Jamison vs. Brainard*, 28 Mo., 341; *Globe Mut. Ins. Co. vs. Carson*, 31 Mo., 218; *State vs. Murphy*, 46 Mo., 430.)

The defendant next objects to the ruling of the court in rejecting the answer of the defendant, Campbell, as evidence for the defendant, Hays, when the same was offered by her



on the trial. It is contended by the defendant, Hays, that no replication having been filed by the plaintiff to the answer of Campbell, it thereby stood admitted, and that she had a right to read the answer of Campbell as admissions of the plaintiffs, upon the trial of the issues on her part.

The 36th section of Art. 5 of Wagn. Stat., p. 1019, provides that, "every material allegation of the petition not controverted by the answer, and every material allegation of new matter contained in the answer not controverted by the reply, shall, for the purposes of the action be taken as true," etc. Under this section of the law the facts not controverted in a previous pleading are to be taken as true in favor of the party pleading them; not as a matter to be submitted to and found by the jury; but they are taken as true as a matter of law, to be declared by the court. (*Steil vs. Ackle*, 15 Mo. 289; *Butcher vs. Death*, 15 Mo., 271.)

In the present case the defendants Campbell and Hays answered separately; in fact the answer of defendant Hays charged that Campbell had joined in and was a party to the fraud practiced on her; her answer was fully replied to and denied. The defense of Campbell being wholly separate from her defense, a failure to deny or controvert the facts contained in Campbell's answer could only operate as admissions for the purposes of the action so far as Campbell's defense was concerned, but it amounted to no admission of the facts stated in Campbell's answer for any other purpose. And particularly it could not amount to an admission of facts specifically denied in the replication to the answer of defendant Hays. Judgment was properly rendered in favor of Campbell on the pleadings; but as defendant Hays had chosen to make a separate defense she could not avail herself of any error or admission, made in the pleadings, which only related to the defense of Campbell. We can see no error in the action of the court in overruling defendant's motion for a new trial.

The judgment will be affirmed; Judge Sherwood not sitting, the other judges concur.

DOMINICK KRONENBERGER, Respondent *vs.* STEPHEN BINZ,  
Appellant.

1. *Account stated—Opened how—Bill must allege what.*—A settlement can be opened only on the ground of fraud, errors or mistakes. And the proceeding for that purpose must specifically set forth such ground.
2. *Settlement—Time of payment extended—Notes given, etc.*—The amount ascertained by a settlement becomes due from the date thereof; and where by the terms of the settlement the debtor agrees to give his note payable at a day named for the amount found to be due, but fails to give the same, the debt accrues immediately.

*Appeal from St. Louis Circuit Court.*

*T. & L. Gottschalk and E. C. Kehr*, for Appellant.

*Jecko & Hospes*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action on an account stated. The petition alleges, that upon a settlement between the parties, the defendant was found to be indebted to the plaintiff in the sum of twenty-four hundred dollars. The answer of the defendant was a denial of all the allegations of the petition.

Upon the trial the plaintiff introduced evidence conducing to prove that there had been a settlement of accounts between himself and the defendant in June, 1869, and that upon such settlement the defendant was found to be indebted to him in the sum of twenty-four hundred dollars, for which he promised to give him two promissory notes, at one and two years, with eight per centum per annum interest from their date. When the notes were applied for, the defendant refused to give them. The evidence on the part of the defendant tended to prove that there was no such settlement. The defendant also offered to impeach the alleged settlement by showing that there was no consideration for the amounts claimed by plaintiff upon which the alleged settlement was based; but the court excluded this evidence and the defendant excepted. This suit was commenced in September, 1869. The defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused. He also asked an instruction—which the

court refused—to the effect that, although there may have been a settlement by which the defendant agreed to execute two notes to the plaintiff at one and two years from the date of the settlement, yet if this suit was brought before the expiration of one year after the settlement, the plaintiff cannot recover. Instructions were also given on both sides to the effect that if there was an accounting and settlement, as stated in the petition, and the defendant was found to be indebted to the plaintiff, the verdict ought to be for plaintiff; and if there was no such settlement, the verdict ought to be for the defendant. The jury found a verdict for the plaintiff. Defendant filed a motion for a new trial, which was overruled, and he excepted: A final judgment was rendered on the verdict, which on appeal to the General Term was affirmed.

There was no error in excluding the evidence to impeach the settlement. There was no foundation laid in the defendant's answer upon which this evidence could be admitted. A settlement is conclusive and can only be opened on the ground of fraud, or for errors or mistakes. The only issue in this case was whether there was a settlement or not. To impeach a settlement, the bill or answer for that purpose must specifically set forth the fraud, errors or mistakes complained of. (See *Moore & Porter vs. McCullough*, 8 Mo., 401; *Stoughton vs. Lynch*, 2 J. Ch. R., 218; 4 Vesey, 411.) The evidence offered was irrelevant to the issue and was therefore properly excluded.

The amount found in favor of the plaintiff by the settlement was due from that time. But the defendant had the right to extend the time by the execution of his notes to the plaintiff in payment of the sum found to be due. On his failure to do this, a right of action immediately accrued to the plaintiff.

On the whole record, the judgment appears to be for the right party.

Judgment affirmed. All the judges concur.

---

Eggemann v. Henschen.

---

HERMANN EGGEMANN, Appellant, *vs.* C. HENRY HENSCHEN,  
Respondent.

1. *Promissory notes—Deed of composition—Estoppel—Trust note.*—In an action by the holder against the indorser of a promissory note, where it appeared that the maker had entered into a deed of composition and release with his creditors, and that plaintiff had accepted its provisions, and nothing on the face of the note showed that it was held by plaintiff in trust, and it was treated by him as his individual property, he is estopped so far as the maker is concerned, from after claiming that he held the note as guardian.
2. *Promissory note—Deed of release as to maker—Release of subsequent indorser.*—Where the holder of a note releases the maker, such release operates as a discharge of the indorser, and the fact that he assents to the release does not alter the case.

*Appeal from St. Louis Circuit Court.*

E. C. Kehr, for Appellant.

The indorser, having assented to the release of his maker, is not discharged. (Mont. Comp., 36; Sto. Bills, 430; Lewis vs. Jones, 4 B. & Cr., § 515; Sto. Pro. Notes, 427; Edw. Bills & N., 291.)

Lubke & Player, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action by the plaintiff as holder, against the defendant as indorser, of the following negotiable promissory note:

“St. Louis, December, 1st, 1867.

Three years after date, we promise to pay to the order of C. H. Henschen, One Thousand Dollars, for value received, negotiable and payable without defalcation or discount with interest at the rate of eight (8) per centum per annum.

HENSCHEN, KRITZ, & Co.

Indorsed, “C. H. HENSCHEN.”

At maturity this note was duly protested for non-payment and due notice thereof served on the defendant.

The defense relied on was, that the note before maturity had been released or satisfied by a composition deed made by Henschen Krite & Co. the provisions of which the plaintiff, as

holder of this note, had accepted in satisfaction of the same. This composition deed was passed on in the case of Diermeyer vs. Hackman (52 Mo., 282), where it was held to be a release by the creditors of their debts. The note sued on was listed as one of the debts under this deed of composition.

The plaintiff, however, claims that this note was held by him as guardian for minor children, and that he did not intend to embrace it amongst the debts to be released. But whether he so intended or not, he did in point of fact list it as one of the debts. It is a negotiable note, indorsed by the defendant in blank, and which had been transferred to the plaintiff by delivery. There is nothing on the face of the note to show that it was held in trust, and the plaintiff had the right to treat it as his own, and did in fact claim it as his individual property by listing it as such under the deed of composition.

Under the rule laid down in Diermeyer vs. Hackman, *supra*, this note, so far as the makers are concerned, was satisfied by the deed of composition.

The defendant also signed the resolution to accept the provisions of the deed of composition. The evidence does not show whether he was a creditor or not, except as payee and indorser of this note.

It is contended that by assenting to the release of the note, under the provisions of the composition deed, his liability as indorser still remained. His liability as indorser was contingent, and could only be fixed by due presentment and notice of dishonor of the note at maturity.

When a holder of a note releases any antecedent party, that operates as a discharge of all the subsequent parties or indorsers on the note—"for otherwise, the remedy of the subsequent parties over against the released party, would, upon payment by them, be gone, or, if they could recover the same, the release of the antecedent party would become virtually inoperative by the act of the holder." (See Story on Promissory Notes, Sec. 423.)

I do not see that the assent of an indorser to such release would make any material difference. The note in suit was

by the deed of composition released, both as to the makers and this indorser; or to speak more properly, was effectually retired as to those parties, and could only be revived by going into the hands of an innocent holder for value before maturity.

Under these views, the judgment, which was for the defendant, will be affirmed with the concurrence of the other judges.

—o—

THE STATE OF MISSOURI, Respondent, *vs.* FRED. MILLER,  
Appellant

1. *Practice, Supreme Court—Bill of exceptions—Record.*—Nothing is brought to the Supreme Court without a bill of exceptions, except the record proper.

*Appeal from St. Louis Court of Criminal Correction.*

ADAMS, Judge, delivered the opinion of the court.

The defendant was prosecuted, and convicted in the St. Louis court of Criminal Correction of an assault and battery. He filed a motion for a new trial which was overruled, and he appealed to this court. There was no bill of exceptions tendered or filed, and the case stands before us upon the naked record, there being no assignment of errors or briefs of counsel on either side.

I have examined the record and find the information sufficiently formal and substantially good. The trial and judgment appear to be regular, and I find no error in the record.

Judgment affirmed; Judge Sherwood absent; the other judges concur.



---

State, ex rel. v. Shortridge, et al.

---

THE STATE OF MISSOURI, *ex rel.* ROBERT AULL AND ISAAC J. POLLARD, Appellants, *vs.* ALFRED L. SHORTRIDGE, *et al.*, JUSTICES OF MACON COUNTY COURT, Respondents.

1. *Macon County—Charter—Tax levied by—How much per annum.*—In mandamus to compel the County Court of Macon county to levy a tax to meet the indebtedness of the county on railroad bonds issued for the Missouri & Mississippi Railroad Company, *held*, that under § 15 of the charter of the company (Sess. Acts 1863, p. 86,) said County Court had no power to levy in one year a tax of more than one-twentieth of one per cent. upon the assessed value of the taxable property in the county. County Courts have only such powers as are granted by statute; they can have no implied right to levy taxes.

*Appeal from Macon County Court.*

*T. K. Skinker*, for Appellants.

*Barrow, Carr & McGindley*, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action for a mandamus to compel the County Court of Macon county to levy a tax to pay the principal and interest of several railroad bonds, held by the relators as purchasers thereof for value before maturity, which bonds had been issued in payment of a subscription made by the county of Macon to the capital stock of the Missouri and Mississippi Railroad Company. An alternative mandamus was issued, to which defendants made their return, and the plaintiff filed a replication thereto, joining issue to the matter set up in the return.

Upon the final hearing the court found for the defendants; refused to make the mandamus absolute, and dismissed the petition. The plaintiff filed a motion for a re-hearing, which was overruled, and the relators have brought the case here by appeal.

The county bonds referred to are in the following form:

"No. 1.

Five years.

County of Macon, State of Missouri.

"\$1,000.

\$1,000.

"Know all men by these presents, that the county of Macon, State of Missouri, acknowledges itself indebted to the

Missouri and Mississippi Railroad Company, (organized by an act of the General Assembly of the State of Missouri), or bearer, in the sum of \$1,000, which sum the county promises to pay at the office of the County Treasurer, in the city of Macon, Missouri, on the 16th day of September, 1872, with interest at six per cent. per annum, which interest shall be payable annually on the presentation of the coupons hereto annexed at the office of the said County Treasurer in the City of Macon, Missouri. This bond being issued under and pursuant to orders of the County Court of Macon county, for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the General Assembly of the State of Missouri, entitled, "An act to incorporate the Missouri and Mississippi Railroad Company." Approved February 20, 1865.

"In testimony whereof the said county of Macon has executed this bond by the presiding Justice of the County Court of Macon county, under the order of said court signing his name thereto, and by the Clerk of said court under the order thereof attesting the same and affixing the seal of said court. This done at the City of Macon, county and State aforesaid, this 16th day of September, 1867.

"[Macon Co.]

JOHN FARRAR, Clerk.

"[Seal of Court.]

A. C. ATTERBERRY,

Presiding Justice of the County Court of Macon County."

The coupons attached are in the usual form.

There is no controversy about the facts. The case was submitted on the alternative writ, the return of respondents, and the reply of relators. The following facts appear: The relators are *bona fide* holders for value of certain past-due bonds and coupons which are described in the writ, and which, as appears by recitals on the face of the bonds, were issued under orders of the County Court of Macon county for subscription to the capital stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the General Assembly of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," Approved February 20,

1865, and were delivered to said company in pursuance to a mandamus from this court. (See State, *ex rel.* Missouri & Mississippi Railroad Company vs. Judges Macon County Court, 41 Mo., 453.) The amount of bonds so issued and delivered was \$175,000; but relators had no knowledge of the amount; nor do the bonds, on their face, disclose the amount. The subscription was made without the assent of two-thirds of the qualified voters of Macon county. The county in 1867 received 1,750 shares of stock in said company, which it still holds and votes at all meetings of stockholders for the election of directors and for other purposes, and enjoys all the privileges of other stockholders. The County Court has, every year, from 1867 to 1872, levied upon and collected from the tax-payers of the county a tax of one-twentieth of one per cent. to pay interest, as stated by respondents. As stated by relators, it has levied taxes sufficient to pay the interest, together with \$12,500 of the bonds themselves, as they matured. Respondents have refused to pay the bonds and coupons in suit, and have refused to levy the requisite tax beyond one-twentieth of one per cent.

It also appears, that the Missouri & Mississippi Railroad Company accepted its charter and organized under it in April, 1866; that the only authority for issuing the bonds in suit was contained in the thirteenth section of the charter. (Sess. Acts 1865, p. 86.) "It shall be lawful for the corporate authorities of any city or town, or the County Court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, *and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year.*" That the assessed value of property in said county in 1867 was \$5,145,810, in 1868 was \$5,304,644, in 1869 was \$5,191,626, in 1870, was \$4,874,467, in 1871 was \$4,264,260, and in 1872 was \$5,466,434.

It is conceded that a tax of one-twentieth of one per cent. has been levied, and that it is wholly insufficient to meet the bonds and interest now due.

The point for us to consider, is whether the County Court of Macon county is prohibited by section thirteen of the charter of the railroad company above quoted, from levying, in any one year, a tax of more than one-twentieth of one per cent. upon the assessed value of the taxable property in the county.

There seems to be no restriction on the power of the county as to the amount of stock to be subscribed or the amount of bonds to be issued in payment of such subscription. Prudence indeed would dictate that the County Court, in the exercise of its discretion, ought not to have subscribed any more stock, or issued bonds to any greater amount, than they had authority to raise funds by taxation to meet the annual interest on the bonds, and the principal when they matured. But this, in my judgment, was a matter of discretion, and an excessive issue beyond the means of payment, of itself, does not render the bonds void.

Section thirteen of the charter above referred to, entered into and formed a part of the bonds themselves, and these bonds must receive the same construction as though this section had been set out in *haec verba* on their face.

There can be no innocent holder, so far as the restriction upon the power of taxation is concerned. Each bond-holder takes it subject to this restriction, and he must ascertain for himself whether there has been an over issue. The records of the County Court will show the amount used, and he can examine for himself as to the amount of taxable property in the county.

The language of section thirteen is plain and positive and will hardly admit of any other than a literal construction. It reads that the County Court "may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

A county is a mere *quasi* corporation, having only such powers as are delegated to it by the legislature. The County Court is the administrative agent of the county, and can only exercise such powers as are conferred on it by statute.

At the time this railroad charter was passed, the general law authorized County Courts which had issued bonds to railroad companies to levy taxes without limitation to pay the interest on their bonds, and to provide a sinking fund to pay the principal (1 Revised Laws 1855, p. 429, § 34). This provision was continued in the General Statutes of 1865, and is still the law of this State. And no doubt this provision would have entered into and formed a part of these bonds, and might have so entered into the obligations of the contract as to prevent a subsequent repeal by the Legislature, if there had been no restriction contained in the special act authorizing this subscription. But the very law authorizing the issue of the bonds in question, also limits the power of the County Court to levy a tax beyond one-twentieth of one per cent. for their payment, in any one year. This limitation was enacted, not for the bondholders, but for the benefit of the taxpayers, so that they might not be harassed with a railroad tax, in any one year, too grievous to be borne.

The only taxes that can be levied by counties are such as are provided for by the statute. The power of taxation is a sovereign right, which belongs alone to the State, and which can only be exercised in pursuance of laws passed by the Legislature for that purpose. There can be no such thing as an implied power in a County Court to levy a tax. The power must be clearly and expressly given by statute. We are called upon to compel the County Court of Macon county, by mandamus, to do what the law does not authorize, but expressly prohibits. In my judgment, this mandamus was properly refused. The Board of Supervisors of Carroll county vs. The United States, *ex rel.* John Reynolds, decided by the United States Supreme Court at the October Term, 1873, reported in the *Western Jurist* for January, 1874, was a case taken by writ of error from the Circuit Court of the United States for the district of Iowa. That case is very analogous to the one under review, and fully maintains the doctrines of this opinion. It is true two of the judges dissented, but not on the point involved in the case.

---

State v. Alexander.

---

Let the judgment of the Circuit Court be affirmed. Judge Napton, having been of counsel below, not sitting. The other judges concur.

---

THE STATE OF MISSOURI, Respondent, *vs.* GEORGE ALEXANDER,  
*alias* MEMPHIS BILL, Appellant.

1. *Practice, criminal—Indictment for burglary in first degree—Conviction of, in second degree and of larceny.*—Where the language of an indictment and the facts proved constituted a case of burglary in the first degree, (Wagn. Stat., 454,) a verdict convicting defendant of burglary in the second degree is error, and will be set aside on appeal to the supreme court. But in such case defendant may be found guilty of larceny.

*Appeal from St. Louis Criminal Court.*

Colcord & Drew, for Appellant.

Normile, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

It is contended, by the defendant in this case, that the judgment is erroneous because the indictment was for burglary in the first degree, and the evidence all tended to show that he was guilty of that offense, if any, but that the conviction was for burglary in the second degree and also for larceny. The indictment charged, that the defendant "with force and arms, about the hour of one of the clock in the night of the same day, the dwelling house of one Clemens Harig, there situate and being, and in which there was at the time a human being, feloniously and burglariously, did forcibly break and enter, with the intent the goods and chattels in the said dwelling house \* \* \* to steal, take and carry away," etc.

The 10th section of the statute which defines burglary in the first degree, declares, that "every person who shall be convicted of breaking into and entering the dwelling house of another, in which there shall be, at the time, some human being, with intent to commit some felony or any larceny therein, either, first, by forcibly bursting or breaking the wall



or outer door, window, or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter; or, second, by breaking in, in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates then actually present aiding and assisting; or, third, by unlocking an outer door by means of false keys, or by picking the lock thereof, shall be adjudged guilty of burglary in the first degree." (Wagn. Stat., 454.)

The next succeeding section (11th) provides that every person who shall be convicted of breaking into a dwelling house with intent to commit a felony or any larceny, but under such circumstances as shall not constitute the offense of burglary in the first degree shall be deemed guilty of burglary in the second degree. It will be observed that the indictment sets forth all the facts which constitute the crime of burglary in the first degree under the tenth section. It was drawn upon that section and no other. Moreover, that is the only section in the statute upon the subject, that will sustain its averments. The proof corresponded with the indictment and showed that the means used in breaking into and entering the house, were in one of the identical modes designated in the section as constituting the crime of burglary in the first degree.

The entrance was effected by cutting out slats in the window shutter, and the shutter was then opened and the window raised. All these concurrent acts clearly fixed the grade of the crime, and applied it to the allegations contained in the indictment. It was, therefore, error in the court to instruct the jury that they should find the defendant guilty of burglary in the second degree. But the defendant was also found guilty of larceny, and separately sentenced for that offense. There are no objections whatever to this last judgment. The result then is, that the judgment convicting the defendant of burglary in the second degree must be reversed, and the one convicting him of larceny must be affirmed.

All the judges concurring, except Judge Sherwood, who is absent.

THE STATE OF MISSOURI, Plaintiff in Error, vs. JOHN S. GIBBS,  
Defendant in Error.\*

1. *Trade marks—Act of 1870—Meant to protect foreign as well as domestic trade marks.*—The act to protect merchants, etc., against counterfeit trade marks approved February 22nd 1870, (Adj. Sess. Acts 1870,) was designed to protect foreign as well as domestic trade marks, and may be invoked by citizens of other States and countries.

*Error to St. Louis Court of Criminal Correction.*

*Vastine & Nicholson*, for Plaintiff in Error.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding commenced in the Court of Criminal Correction, under the provisions of the law in reference to trade marks.

The affidavit charged that Lea & Perrin were co-partners, and that the firm had for many years past been manufacturers and dealers in a sauce known and called Lea & Perrin's Worcestershire sauce, and that in the use and sale of said sauce, said firm usually affixed and used a label and wrapper, a sample of which was appended. The affidavit then alleges that on a certain day the defendant unlawfully did have in his possession a certain brand, and printed label and wrapper representation and imitation of the said label and wrapper of the firm of Lea & Perrin, for the purpose of using the same upon and in connection with a certain article made, manufactured, prepared and compounded by said defendant, or his servants and agents, or person or persons, other than the said firm of Lea & Perrin, and passing the same off upon the community as the original wares, goods and compounds of the firm of Lea & Perrin, and that the firm of Lea & Perrin did business in the City of London, England, and had no place of business in the county of St. Louis.

The affidavit further charged that the defendant kept for sale a certain article of merchandise and preparation upon which, and in connection with which, were certain forged, counterfeit and imitation labels, brands and wrappers placed, affixed and used, which were intended to represent the said

merchandise and preparation as the genuine goods, merchandise and preparation of certain other parties, to-wit: the firm of Lea & Perrin, etc.

To this information the defendant filed his motion to dismiss: 1. Because the complaint did not charge upon the defendant the violation of any statute known to the laws of the State of Missouri; 2. Because the law under which the defendant was prosecuted was not intended to, nor did it, protect merchants or manufacturers doing business in any other place than in the State of Missouri; and, 3. Because the law on which the complaint was based, was for the protection of merchants and manufacturers doing business in this State.

This motion was by the court sustained, and the State sued out its writ of error.

The determination of the case must be governed by construing the act to protect merchants and manufacturers against counterfeit trade marks, approved February 22, 1870, (Adj. Sess. Acts 1870, p. 72; Wagn. Stat., [1872,] 1330).

The first section affixes a penalty for forging or counterfeiting trade marks, and provides that any person or persons who shall knowingly and wilfully make, forge or counterfeit any representation, likeness, similitude, copy or imitation of the private label, brand, stamp, wrapper, engraving, mould or trade mark usually affixed by any manufacturer, mechanic, merchant, tradesman, druggist, person or body politic or corporate, to upon or used in connection with the goods, wares, merchandise, compound or preparation of such manufacturer, mechanic, merchant, tradesman, druggist, person or body corporate or politic, with intent to pass off any goods, wares or merchandise, compound or preparation to which said forged counterfeit representation, likeness, similitude, copy or imitation is affixed, or in connection with which the same may be used or intended to be so affixed or used, as the work, goods, wares, implements, merchandise, compound or preparation of such manufacturer, mechanic, merchant, druggist, tradesman, person or body corporate or politic, shall upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by imprison-

ment in the county jail for a period not less than three months nor more than twelve months, or fined not less than \$500 nor more than \$5,000, or both.

The second section affixes a penalty for fraudulently keeping such counterfeit trade-marks on hand, and declares that any person or persons who shall, with intent to defraud, have in his or her possession any die or dies, plate or plates, brand or brands, engraving or engravings, printed labels, stamps, imprints, moulds, wrappers, or trade mark, or any representation, likeness, similitude, copy or imitation of the private label, brand, stamp, wrapper, etc., usually affixed by any manufacturer, etc., shall upon conviction thereof be punished as in the preceding section.

The third section imposes and prescribes a penalty for keeping for sale any article or articles to which counterfeit trades marks are affixed, and the fifth section gives all courts in this State, having criminal jurisdiction, power to try cases for violations of this act.

A reading of the act shows that it is comprehensive and general in its character. There is not a word or an intimation given that it was intended to apply only to citizens of this State. Indeed, to give it such a construction would, I apprehend, defeat its principal object and expose our people to all the impositions and deceptions against which the law was intended to guard them. There is a well known right of property in a trade mark, which the law will protect, and which it was not the intention of the statute to abridge. The citizens of foreign States will be protected in their rights of property in trade marks in our courts, the same as our own citizens. (*Taylor vs. Carpenter*, 11 Paige, 229; S. C., 2 W. & M., 1.)

But aside from this, the statute had another important purpose in view, which was intended directly to benefit our own citizens, and shield them against counterfeiters and impostors. Many articles manufactured by certain persons, firms and corporations, have attained high reputation, and are of great excellence, and those articles are sold with peculiar marks, brands

---

Kellogg v. Schnaake.

---

or wrappers, or other devices, which have been adopted to show by whom they were made. These trade marks are valuable to the persons who have a proprietary interest in them and to the people who buy and use the articles, because they are a guarantee of their genuineness. But if by fraudulent means other parties are permitted to counterfeit and forge and simulate these trade marks, and attach them to inferior or different articles, the community is imposed on and cheated. It was to prevent this that the law was enacted. And in its provisions it makes no distinction as to where the original manufacturer resides. It applies to all alike, and was designed to protect our people against gross deception and imposition, regardless of the place where the genuine articles were made.

For these reasons the judgment should be reversed and the case remanded. All the judges concur, except Judge Sherwood, who is absent

—o—

SANFORD B. KELLOGG, Respondent, vs. CLEMENS A. SCHNAAKE, Appellant.

1. *Promissory Notes—Purchase after dishonor—Defenses, etc.*—The purchaser of a note after maturity takes it subject to all existing and prior equities

*Appeal from St. Louis Circuit Court.*

*Peter J. Taaffe*, for Appellant.

*Lee & Adams*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note indorsed to plaintiff after maturity, to recover a balance alleged to have been due thereon. The facts appear to be, that on the 2nd day of July, 1868, the defendant executed the note to one Christian Meyer, and secured its payment by a deed of trust on certain lots of ground, in which deed of trust one August Gehner, who sold the note to plaintiff, was trustee. The note

was due and payable one year after date, and on the 23d of February, 1869, the defendant executed a quit claim of the said lots to the said Gehner and one Louisa Hoelgel for the consideration of one dollar and the payment and cancellation of the deed of trust. Before the note fell due Gehner took it up from the holder and kept it in his possession till the 2nd of August, 1869, and then, after it was past due for one month, sold and transferred it to the plaintiff. The plaintiff paid the full face of the note, and then on the same day received from Gehner, the trustee, a quit claim deed executed to him for the lots mentioned. Afterwards, in 1871, the plaintiff prevailed upon the trustee to sell the lots under the deed of trust, and at the sale plaintiff became the purchaser for a less sum than the note called for, and then brought this action to recover the difference between the amount of the note, with interest, and the sum realized at the sale.

The trial was by the court sitting as a jury, and the following declaration asked for by the defendant was given: "If the court sitting as a jury believe from the evidence, that at the time Gehner indorsed the note to plaintiff there was an agreement and understanding between them that the note and deed of trust of Schnaake to Christian Meyer's trustee were then and there and thereby cancelled and paid, then it will find for defendant."

The court refused this instruction, which the defendant requested to be given: "If the court sitting as a jury, believe, that on or about the 23d day of February, 1869, defendant, Schnaake granted and quit-claimed his interest in certain lots situated in Union addition and more fully described in the deed introduced in evidence in the trial of this cause, to August Gehner and Louisa Hoelgel in consideration, among other things, of the payment by said grantees, or either of them, of the note in question, and that either after or before that day the said Gehner took up the note from Otto Dieckman, the lawful holder thereof, and that the said Gehner indorsed and transferred the said note to plaintiff on the 2nd day of August, 1869, after maturity, then it will find for defendant."



The court then rendered a judgment for the plaintiff, from which the defendant has appealed.

The plaintiff admits in his testimony, that before the note was transferred to him and he received the quit claim to the real estate, he had the title to the property examined and was aware of the recital in the deed to Gehner and Hoelgel, that the consideration they gave for the property was the payment of the deed of trust. He also says, that by that expression he understood that the note was paid off. This shows that he had actual knowledge of the fact that the parties took the property in payment of the note. However, as he received the note after maturity, it was subject to all existing and prior equities, even had he not been possessed of that knowledge.

When Gehner took up this note it was already a paid note in his hands. He had received and acknowledged full consideration for it. He could not have maintained an action on it, for the case shows that it was fully paid off in his hands. He had bought the property and the payment of the note was the consideration that he gave for it. If he could not recover, neither can his indorsee, for the latter only succeeded to such rights as his indorser had. The plaintiff acquired the note when it was subject to all the defenses which the defendant might have against it, and one of those defenses was a full and complete payment.

The Circuit Court erred, and its judgment must be reversed and the cause remanded. All the judges concur.

—o—

WILLIAM GITT, Plaintiff in Error, vs. GEORGE S. EPPLE, Defendant in Error.

1. *Ejectment—Falsa demonstratio.*— In a suit in ejectment, it appeared that "A" had obtained a concession of certain lands in New Madrid, from Baron De Carondelet; that he conveyed to plaintiff's grantor all his lot or lots in the town of New Madrid, which were at any time granted to him by the commandant of that place. *Held*, that in the absence of any extrinsic evidence showing that he was not the owner of another lot in New Madrid in addition to the above con-

---

Gitt v. Eppler.

---

cession and granted by the commandant, the words "which were at any time granted to him by the commandant of the place," could not be rejected as a false demonstration in order to show that the same land passed by both grants.

*Error to St. Louis Circuit Court.*

The counsel of the parties agree upon the following statement as showing the facts of the case upon which the question of law arises.

This was an ejectment to recover part of U. S. Surv. No. 2553, of New Madrid, Loc. No. 95, in the name of Nicholas Hebert or his Legal Representative. The plaintiff's title was traversed by the answer.

At the trial the plaintiff read the patent of the U. S. to N. Hebert or his Legal Representative dated Nov. 22, 1872, for the lands embraced in Survey 2553.

Plaintiff also read the claim of said N. Hebert, filed Feb. 25, 1811, before the Board of Commissioners, for a lot in the village of New Madrid, as follows :

"Nicholas Hebert, claiming a lot in the village of New Madrid, 180 feet square, produces to the Board a concession from the Baron De Carondelet, dated 30th March, 1793, a plat of the village of New Madrid, on which claimant's lot is No. 159, situate on Dauphin and St. Lorenzo streets."

The Board confirmed the claim, and in lieu thereof the New Madrid certificate was issued, which was the basis of the patent.

To show his derivative title, plaintiff read a deed from Nicholas Hebert to Andrew P. Gillespie, dated July 18, 1815, with the following description

"All his lot or lots in the town of New Madrid aforesaid which were at any time granted to him by the commandant, of that place, and all the land which may be obtained for the same from the United States because of the liberality of Congress, and he is hereby authorized to relinquish the same for his own use and benefit."

Plaintiff then showed a derivative title from Gillespie to himself. The plaintiff's evidence was admitted, subject to objections to its materiality and competency.

The court declared that, upon the plaintiff's evidence, he was not entitled to recover, and plaintiff became non-suit, and his motion for new trial being overruled and the judgment affirmed at general term, he prosecutes this writ of error.

The only question in the case is, did the deed from Hebert to Gillespie convey the lot confirmed so as to pass the title to the re-located land?

*C. C. Whittelsey*, for Plaintiff in Error.

I. The Circuit Court erred in its ruling, that the deed of Hebert to Gillespie did not describe the lot confirmed to Hebert, for, until it was shown that N. Hebert had more than one lot in the town of New Madrid, the rule must apply: *Falsa demonstratio non nocet cum de corpore constat*. (1 Green. Ev., § 301 and cases cited; 2 Phil. Ev., C. & H. notes, [Ed. 1859,] p. 747, n. 1; Hardy vs. Matthew, 38 Mo., 121; King vs. Fink, 51 Mo., 209; Campbell vs. Johnson, 44 Mo., 247.)

II. We must note the history of the country and the manner of making grants, showing that the descriptive words, "*granted by the commandant*," might be applied to a lot granted by the governor general.

See report to Congress of Board of 1832 and 1833, and testimony of Delassus as to manner of making grants. See also, claims filed in said report; Richard Caulk, indorsed by commandante at St. Andre; Old Mines Claim, No. 9; Louis Lorimier, No. 22; St. Gemme Beauvais, No. 28, etc.

*Sam. Reber & W. H. H. Russell*, for Defendant in Error.

I. The plaintiff showed no title in himself to the land. He professed to derive title from Nicholas Hebert, who conveyed to one Gillespie (under whom plaintiff claims) "all the lot or lots in the town of New Madrid aforesaid, which were at any time *granted to him by the commandant of that place, etc.*," whereas the deed only conveys such lot or lots as were granted to Hebert by the commandant of New Madrid, and there is no evidence of any such grant.

Hebert may have had many lots in New Madrid not granted to him by the commandant as well as lots so granted.

If the deed can be so construed as to convey land not granted to Hebert by the commandant, it must be made to appear by the evidence that he intended to convey other land, and this the plaintiff has failed to show.

We assume that the court will take judicial notice not only of the laws of upper Louisiana, but of the officers who governed it and of the powers which they respectively possessed; and therefore will take notice that the Baron De Carondelet was governor general, residing in New Orleans, with a superintending control over the officers of upper Louisiana, and that there were officers in the latter territory who had power to make grants of the public domain, of whom the commandant at New Madrid was one.

That such was the case see evidence of Lient. Gov. DeLassus, Vol. 5, American State Papers, Public Lands, pp. 708 and 709. See also Vol. 3, American State Papers, p. 288 and following for grants by Henry Peyroux, commandant of New Madrid.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff for the recovery of premises described as "being part of New Madrid location No. 95, United States Survey No. 2553; bounded on the West by the survey line; East by land claimed by D. Fink and M. Hammer and South by lands claimed by D. and C. Fink, containing thirty-five acres more or less.

The defendant by his answer denies the allegations of the petition, and avers that he has been in the peaceable adverse possession of the land for more than twenty years.

A jury was waived by the parties and the case submitted to the court for trial.

The plaintiff, in order to prove title in himself to the land sued for, offered in evidence: First, a patent of the United States dated November 22, 1872, for the land embraced in New Madrid certificate No. 95, United States Survey No. 2553, which covers the premises in dispute, to Nicholas Hebert or his legal representatives.

Second, a deed from Nicholas Hebert to Andrew P. Gillespie, executed on 18th day of July 1815, which describes the land conveyed by Hebert to Gillespie, as "all his lot and lots in the town of New Madrid aforesaid, which were at any time granted to him by the commandant of that place, and all the land which may be obtained for the same from the United States because of the liberality of Congress; and he is hereby authorized to relinquish the same for his own use and benefit. This deed purported to have been acknowledged on the 28th day of May 1816, and recorded August 17th, 1872. The plaintiff proved by proper evidence that said deed was found among the files in the office of the U. S. Recorder of St. Louis Titles, and that said deed was delivered to plaintiff by Adolp. Renard, Recorder of Land Titles in the year 1847.

The plaintiff also offered in evidence other deeds conveying the title of Gillespie to him. The plaintiff then, in order to identify the land sued for as being a part of the land contemplated and conveyed to Gillespie, by Hebert, offered in evidence the following copy of certificate No. 1091, and claim therewith, to-wit: "Louisiana Commissioners certificate No. 1091, June 20th, 1811. We, the undersigned, Commissioners for ascertaining and adjusting the title and claims to land in the Territory of Louisiana, have decided that Nicholas Hebert, original claimant, is entitled to a patent under the 4th section of an act of the Congress of the United States entitled 'An act respecting claims to land in the Territory of Orleans and Louisiana,' passed the third day of March one thousand eight hundred and seven, for one hundred and eighty feet square of land, situate in the district of New Madrid, village of New Madrid, and ordered that the same be surveyed conformable to the concession. By virtue of a concession or order of survey from Baron De Carondelet, governor general." This certificate was signed by the commissioners.

The plaintiff also read in evidence a copy of the claim and entry upon which the confirmation was made, as follows:

"Monday, February 25th, 1811.

Board met: Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, Commissioners. Nicholas Hebert claim-

---

Gitt v. Eppler.

---

ing a lot in the village of New Madrid 180 feet square, produced to the board a concession from Baron De Carondelet, dated 30th March 1793, a plat of the village of New Madrid, on which claimant's lot is No. 159, situate on Dauphin and St. Lorenzo streets." The following testimony in this claim is from the rough minutes as perpetuated by the board on the 2d of August 1809. "Antoine Vorcharddit Lordaise, sworn, says, that about 13 or 14 years ago, claimant cultivated said lot and continued to do so for about 8 or 9 years. The board confirmed to Nicholas Hebert one hundred and eighty feet square of land, and order that the same be surveyed conformably to the concession." This was signed by the board and accompanied by the following certificate :

"New Madrid certificate, No. 95."

"Office of the Board of Land Titles."

St. Louis, November 16, 1815.

"No. 95.—I certify that a lot of 180 feet square in the town of New Madrid, and the County of New Madrid, which appears from the books of this office to be owned by Nicholas Hebert, has been materially injured by earthquake, and that in conformity to the provisions of the act of Congress of 17th February 1815, the said Nicholas Hebert or his legal representatives, is entitled to locate any quantity of land, not exceeding one hundred and sixty acres, on any of the public lands of the Territory of Missouri, the sale of which is authorized by law."

Signed, "Frederick Bates."

To all of the foregoing evidence and exhibits the defendant objected, as the same was offered, as not tending to show title in plaintiff to the premises in controversy. The evidence was at the time admitted by the court subject to the defendant's objections. The plaintiff then gave evidence tending to prove the value of the rents and profits of the land, which was all of the evidence given or offered in the case. The court then, at the instance of the defendant, declared the law to be that "on the case made by the plaintiff he is not entitled to recover in this action." The plaintiff at the time



excepted to this ruling of the court, and took a non-suit with leave to move to set the same aside, which motion was made and overruled, when the plaintiff again excepted, and appealed to the general term of said court, where the judgment rendered at special term was affirmed and the plaintiff has brought the case here by writ of error.

There is only a single question raised or argued by the parties in this case, for the consideration of this court. The plaintiff, to prove himself the legal representative of Nicholas Hebert, and therefore the owner of the land described in the patent to him, relied on a conveyance from Nicholas Hebert to A. P. Gillespie for a lot in New Madrid, which he insists conveyed to Gillespie the lot in New Madrid, in lieu of which the certificate of re-location was issued upon which it is also insisted the patent to Hebert read in evidence was founded. The question is, did that conveyance describe the land so as to pass the title? The description in the deed from Hebert to Gillespie purported to convey to Gillespie a lot or lots described, as "all his lot and lots in the town of New Madrid aforesaid, which were at any time granted to him by the commandant of that place, and all the lands which may be obtained for the same from the United States, because of the liberality of Congress."

The evidence offered by the plaintiff is to the effect that the lot, the title to which was confirmed, and in lieu of which the land was located for which the patent issued to Hebert, was a designated lot in the town of New Madrid which he held by virtue of a concession from Baron De Carondelet, governor general, &c.

Now it is contended by the plaintiff, that the evidence given by him rendered the description in the deed from Hebert to Gillespie sufficiently certain to describe the land in controversy, and to vest the title in plaintiff. He insists that until it is shown that Hebert had more than one lot in the town of New Madrid, the words in the deed to Gillespie "which were at any time granted to him by the commandant of the place" should be rejected as a false demonstration, and that

when said words are rejected, enough remains to pass the lot; which lot was confirmed and in lieu of which the land in controversy was located. It is contended that the descriptive part of the deed is "all his lot or lots in the town of New Madrid," and that that description is sufficient, the remainder of the descriptive words being rejected as a false demonstration. The question is, by what authority can we reject the other descriptive words in the deed? The words following those last above quoted, "which were at any time granted to him by the commandant of the place," seem clearly to be intended as a limitation upon the previous more general words, or at least it fairly admits of that construction; and the implication is, that the grantor had other lots in the town of New Madrid, which do not come within this last designation. How can we say under such circumstances without any extrinsic evidence on the subject, that any part, or what part of these descriptive words are false, or what true? There is no doubt but there are many cases where land is designated in a deed or will by a description which is in itself a sufficient designation or description to pass the land, and the deed or will contains a further description which is false. When the latter description is shown to be false, it will be rejected as a false demonstration, and the land pass by the remaining description. (Greenl. Ev., § 301, and cases cited; Hardy vs. Mathews, 38 Mo., 121; King vs. Fink, 51 Mo., 209; Shewalter vs. Pirner, 55 Mo., 218.) In all such cases the difficulty does not arise from any ambiguity or uncertainty on the face of the deed, but from the application of the description to the subject matter intended to be conveyed. When an attempt is made to apply the description to the subject matter from the extrinsic facts surrounding the whole case, the falsity of one portion of the description is ascertained, and when it is seen that otherwise no effect could possibly be given to the instrument, the false description will be rejected; but as long as there is anything that could pass by the description as it appears in the deed, no part of the description can be rejected.

In the case under consideration, the evidence offered by the plaintiff shows that the land claimed by him in this suit was

in lieu of a lot granted to Hebert by the Baron De Carondelet governor general, and not by the commandant of New Madrid; and there is no evidence to show that Hebert did not own other lots in the town of New Madrid, which were granted to him by the commandant of the place which would exactly fill the description in the deed. In such case, in the absence of some controlling extrinsic facts showing the falsity of a part of the description, the whole of which is perfectly consistent, we are not authorized to presume that any part of the description in a deed is false.

It is however insisted by the plaintiff, that the court will take judicial notice of the history of the country by which it is asserted that it is shown that the descriptive words "granted by the commandant" might be applied to a lot granted by the governor general. It seems from the history of the times that commandants of villages were at one time in the habit of making concessions or grants of the domain to cultivators thereof, and whether this was strictly legal or not, can make no difference if such grants were made. Whether right or wrong, the description would be satisfied by a reference to the fact when found to exist. (See testimony of DeLassus, 3 American States Papers, 708.) The facts appearing in the record of this case, fail to show but what Hebert might have had lots in New Madrid, exactly suited to the description in the deed to Gillespie, or otherwise to show how or in what part the descriptive words or any of them, in said deed, were false. Therefore none of them could be rejected as a false demonstration.

The judgment will be affirmed. The other judges concur.

THE STATE OF MISSOURI, Respondent, vs. JNO. D. CROWNER  
AND NETTIE GORDON, Appellants.

1. *Criminal law—Open and notorious adultery—What constitutes.*—Persons in order to be guilty of living together in open and notorious adultery, as meant by the statute (Wagn. Stat., p. 500, § 8), must reside together publicly, in the face of society, as if the conjugal relation subsisted between them, and their illicit intercourse must be habitual and not occasional.

*Appeal from St. Louis Court of Criminal Correction.*

VORIES, Judge, delivered the opinion of the court.

The defendants in this case were prosecuted for living in a state of open and notorious adultery. The information upon which they were prosecuted charged: "That John D. Crowner and Nettie Gordon, as affiant believed, in St. Louis county, on the 1st day of May, 1873, and on divers other days and times between that day and the filing of the complaint, unlawfully did live together in a state of open and notorious adultery, the said John D. Crowner being then and there, on the day aforesaid, a married man, and having then and there a lawful wife alive and in being, other than the said Nettie Gordon, and the said John D. Crowner and the said Nettie Gordon not being then and there and on said other days lawfully married to each other, contrary to the form of the statute, etc."

The defendants pleaded not guilty. A jury was waived and the cause submitted to the court for trial. It appears from the evidence in the case, that the defendant, John D. Crowner, at and before the time that the offense stated in the information is charged to have been committed, was a married man, and was residing with his lawful wife, and keeping a hotel in the town of Franklin, in this State; that about the last of July or the first of August in the year 1873, the defendants both together appeared at the house of Mrs. Fanny Fletcher, who then resided and kept a private boarding house at No. 1609, Second Carondelet Avenue, in the city of St. Louis; they represented that they had visited the house for the

purpose of looking at Mrs. Fletcher's rooms, with a view to rent or hire the use of one of them for occupation; that they found a room that suited them and rented it for one month, paying the rent or price in advance; that on the next day, which was Tuesday, they took possession of the room; that they did not both occupy the room that night, but that defendant, Crowner, left and went away in the evening and did not return until the following Thursday evening, when he remained all night with the defendant, Nettie, in the room, and the witness was of the impression that both defendants stayed in the room three nights of that week, but was not certain as to any night but one. This witness further testified, that there was only one bed in the room; that she never saw or suspected anything improper between the defendants, until Mrs. Crowner came to the house on the last afternoon referred to, and broke the door open and found the defendants in the room together, which was the only time that Crowner was known to have been in the room with Nettie in the day-time. It was further shown by the evidence, that on the first Sunday in August, 1873, defendant, Crowner, and his wife came to the city of St. Louis from the town of Franklin and put up at the house of a friend; that Mrs. Crowner remained at the house of her friend all night, but that Crowner was absent during the day of their arrival, and did not return that night or the next day; that in the afternoon of the next day, which was Monday evening, Mrs. Crowner and her lady friend with whom she was stopping, visited the house of Mrs. Fletcher at 1609, Second Carondelet Avenue, where Mrs. Crowner inquired for her husband. She was directed to the room which had been rented by the defendants, where she knocked at the door for admission. Admission being refused, she forced open the door and found the defendants in the room together, Crowner undressed and Nettie Gordon dressed as usual, only one bed in the room, which, from the appearance, had not been made up since being used; that some disturbance was caused by this surprise, and Nettie Gordon took her furniture and left the room, to which she never returned. It further appeared, that

defendant, Crowner, and his wife then returned to their home in Franklin together, where they resided together for several weeks, when Mrs. Crowner left to visit her friends in some of the Eastern States. The evidence also showed that Nettie Gordon had no knowledge that Crowner was a married man until his wife came to the room at Mrs. Fletcher's at the time before referred to.

This was substantially the evidence in the case. At the close of the evidence the defendants moved the court to make the following declarations of the law as applicable to the case:

First—"That if the court sitting as a jury shall find from the evidence that the defendants were not living together in a state of open and notorious adultery, but were simply at the time charged in the information stopping together in the same room occasionally, and were only guilty of occasional acts of illicit intercourse, then the court should find the defendants not guilty."

Second; "If the court, sitting as a jury, find and believe from the evidence, that the defendant, Nettie Gordon, did not know that the defendant, John D. Crowner, was a married man, at the time and place alleged in said information that the defendants lived together in open adultery, then the court should acquit defendant, Nettie Gordon." These instructions or declarations of law were severally refused by the court and the defendants excepted. The court then found both of the defendants guilty and assessed their punishment at a fine of \$300 each.

The defendants filed a motion for a new trial, stating as grounds therefor the refusal of the court to declare the law, as asked for by the defendants, and also that the finding of the court was against the evidence and against the law of the case. This motion being overruled by the court the defendants both appealed to this court.

The statute under which this prosecution was had is as follows: "Every person who shall live in a state of open and notorious adultery, and every man and woman (one or both



of whom are married, and not to each other) who shall lewdly and laciviously abide and cohabit with each other, and every person married, or unmarried, who shall be guilty of open, gross lewdness or lacivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in the county jail, not exceeding six months, or by fine, not exceeding three hundred dollars, or by both such fine and imprisonment." (Wagn. Stat., 500, § 8.) This statute contemplates three different classes of offenses. The first, and the one for which the defendants in this case were prosecuted, applies only to persons who live in a state of open and notorious adultery, and the offense under that clause of the statute can only be committed by a married person; the second class of offenses can only be committed by a man and woman, one or both of whom are married, and not to each other, and who shall lewdly and laciviously abide and cohabit with each other, etc. The third class of offenses provided for, may be committed by any person, either married or unmarried.

The defendants in this case are charged with living in a state of open and notorious adultery. The offense consists of an open and notorious living or cohabiting together; occasional illicit intercourse will not constitute the offense. The statute was intended to provide against persons who in defiance of morality and of the good or well-being of society should openly live together; they must reside together publicly in the face of society as if the conjugal relation existed between them, their illicit intercourse must be habitual. (Wright vs. the State, 5 Blackf., 358; Searls vs. The People, 13 Ill., 597; State vs. Gartrell, 14 Ind., 280; State vs. Marvin, 12 Iowa, 499; Hinson vs. The State, 7 Mo., 244; Dameron vs. The State, 8 Mo., 494.)

I would not be understood to say that the cohabiting and abiding together must be for any great length of time, perhaps a short time would do, but the parties must live together in a notorious and open manner to the evil example of

society. Simply having occasional illicit intercourse, without a public or notorious living together, as the evidence in this case tends to prove, is certainly not sufficient. It follows that the court erred in refusing the first declaration of law asked for by the defendants, and in overruling the defendant's motion for a new trial. It is not necessary to notice any other points raised in the argument of the case in this court.

The judgment must be reversed. Judge Sherwood not sitting, the other judges concur.

—o—

OSCAR P. BALDWIN, Defendant in Error, *vs.* THE CHOUTEAU INSURANCE CO. OF ST. LOUIS, Plaintiff in Error.

1. *Insurance—Acceptance of premium—Delivery of policy—Notice of fire—Payment of premium—Waiver—Instructions.*—When an Insurance Company accepts the premium and delivers the policy, the contract to insure is complete and executed; and it relates back to the day when the application was filed and the policy made out and signed; and the insured is under no obligation to notify the company that the building insured has been destroyed by fire in the meantime. And the premium need not be paid in order to bind the contract, where the company waives its right to immediate payment and extends credit to the assured. The obligation of the company remains notwithstanding, and the question of such waiver is one of fact to be submitted to the jury by appropriate instructions.

*Error to St. Louis Circuit Court.*

*Orrick & Emmons*, for Plaintiff in Error.

Plaintiff being unable to pay the premium refused to accept the policy till after the fire, when he obtained it by concealing that fact. The contract of Insurance could not consist with such refusal. In *Keim vs. Home Mut. Fire Ins. Co.* (42 Mo., 38,) no demand was ever made upon *Waterman* for the premium; and there was no refusal on his part.

*W. F. Causey*, for Defendant in Error.

I. When the company on the same day proceeded to make out and sign the policy, it ratified the application and its con-

sent was complete. The acceptance of a proposal to insure for the premium offered, is the completion of the negotiation. (Ang. Ins., 341, *et seq*; Keim vs. Home Mut. Fire & Mar. Ins. Co., 42 Mo., 38; Taylor vs. Merchants' Ins. Co., 9 How., 390; Com. Ins. Co. vs. U. M. Ins. Co., 19 How., 318; Hallock vs. Com. Ins. Co., 2 Dutch [N. J.] 268; 3 Dutch, 645.)

II. Where the company accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the day when the application was filed and the policy made out and signed, and the insured was under no legal obligation to notify the company that the building insured had been burned in the meantime. (42 Mo., 38, and the authorities there cited.)

The moment the policy is signed it becomes the property of the assured without manual delivery to him. The company hold it as the bailee of the assured, and he can maintain trover against them for its recovery. (Kohne vs. Ins. Co., of North America, 1 Wash., C. C. R., 93; Pim vs. Reed, 6 Mann. & Gr., also the cases above cited.)

III. Whenever it is a condition of a policy that the insurance shall not commence before the premium is actually paid, this is waived by issuing the policy, or in other words, signing it before payment. (Ky. M. L. Ins. Co. vs. Jenks, 5 Porter [Ind.], 96; Goit vs. Nat. Protection Ins. Co., 25 Barb., 189; Ang. Ins., 343; 19 How., 318; 2 Dutcher, 268; Thompson vs. St. L. Mut. Life Ins. Co., 52 Mo., 469.)

WAGNER, Judge, delivered the opinion of the court.

In Keim, *et al.* vs. Home Mutual Fire and Marine Ins. Company (42 Mo., 38), we decided that where an application for insurance was filed, and on the same day the company proceeded to make out and sign the policy, it ratified the application and its consent was complete; that the acceptance of the proposal to insure for the premium offered was the completion of the negotiation; and that when the company accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the day when the application was filed and the policy made out and signed,

and that the building insured having been burned in the meantime, the plaintiff was under no legal or moral obligation to inform the company of that fact.

It appeared in that case, that an application to the secretary of the insurance company was made on the 9th of February, 1860, to have the property insured for the sum of \$3,000. The application was accepted by the secretary, and the terms agreed upon, and the policy was to take effect from noon of that day; the policy was made out immediately thereafter and signed, and both the application and policy were permitted to remain in the hands of the company. On the 14th of March, 1860, the building insured was consumed by fire, and after intelligence of that fact was communicated to the insured, he went to the office of the company, paid the premium, and obtained the policy. He did not disclose the fact of the building being burned up when he got the policy, and the insurance company was ignorant of that fact when the same was delivered. As soon as knowledge of the burning came to the possession of the company it refused to pay the loss, but it was held that on the acceptance of the terms proposed a mutual assent took place; the minds of both parties met on the subject in the manner contemplated at the time of entering into the negotiation, and the contract became binding on each and related back to the day the application was filed and the policy made out.

In *May on Insurance*, § 44, it is said, that the agreement for insurance is complete when the terms thereof have been agreed upon between the parties, and the reciprocal rights and obligations of the insurer and the insured, date from that moment, without reference to the execution and delivery of the policy, unless these two elements are embraced within the terms agreed upon. The contract imparts an obligation on the part of the insurer to execute and deliver a policy to the insured; and on the completion of the negotiations the policy executed in accordance therewith and dated on the day of the completion, though not actually delivered till afterwards, or at all, will take effect from its date unless some other terms are expressly agreed upon. Many cases are cited by the author

to support this doctrine. (See *Lightbody vs. North Missouri Insurance Company*, 23 Wend., 18; *Hallock vs. Com. Ins. Co.*, 2 Dutch, 268; S. C. affirmed, 3 Dutch, 645; *Flint vs. Ohio Ins. Co.*, 8 Ohio, 501; *Xenos vs. Wickham*, 2 Law Rep. [H. L.], 296; *American Home Ins. Co. vs. Patterson*, 28 Ind., 17.)

The agreement may exist and be complete prior to drawing up and delivering the policy, and courts will interpose and furnish relief when the negotiations have reached such a point that nothing remains to be done by either party but to execute what has been agreed upon. Thus in *Kohne vs. Ins. Co. of North America* (1 Wash., C. C., 93) the plaintiff's agent applied for insurance and agreed upon all the terms, but left the office before the policy was filled out. This however, was filled out within a few hours and notice thereof given by the company, accompanied, however, by notice that the company had received information that a loss had happened. On calling for the policy and tendering the premium, the agent refused on the ground that a loss had happened before the delivery and the contract was not complete. But the court held otherwise, as everything had been agreed on, and nothing remained to be done but to carry out the terms already agreed on, and the plaintiff had a verdict.

In the case of the *Commercial Mutual Marine Insurance Company vs. Union Mutual Insurance Company* (19 How., 318), an application for re-insurance was made on Saturday upon certain terms, which were declined and other terms demanded, and on Monday these last mentioned terms were accepted by the applicant, and assented to by the president of the company, but the policy was not made out because Monday was a holiday, and on that night before anything more was done by the company, the ship which was the subject matter of the insurance was totally destroyed by fire. On the next day after the fire, the insured tendered their note for the agreed premium and demanded the policy of re-insurance. The Company declined to make the policy. The Supreme Court of the United States unanimously held, that when the parties agreed upon the terms the contract was

executed and complete, and that the plaintiffs were entitled to recover.

So in the case of *Whittaker vs. the Farmers' Union Insurance Company*, (29 Barb., 312). There, the plaintiff on the 28th of March, applied for insurance to the agent of the company who gave him a receipt acknowledging the payment of the premium and stating that the policy was to take effect on that day at noon. The premium was not actually paid at the time, it being agreed that the plaintiff might send it to the agent at his convenience. The property insured was destroyed by fire on the 7th of April. The premium was sent to the agent immediately after the fire and he accepted the money without having heard of the loss, and sent the application, together with the premium to the company. The company thereupon, without any knowledge of the fire, forwarded a policy for the plaintiff to the agent, but subsequently on being informed of the loss, instructed him not to deliver the same. It was held that when the Company accepted the premium and forwarded the policy to its agent for delivery, the agreement to insure was complete and ratified and related back to the 28th of March, the day on which the application was made, and that the plaintiff was entitled to a specific performance thereof, by the delivery of the policy to him and the payment of the amount of the loss, and that he was under no obligation, either moral or legal, to inform the Company of the destruction of the insured building.

In the present case the facts are, that at the solicitation of the defendant's agent, the plaintiff made his application for insurance on the 10th day of January, 1871. The application was duly accepted and the terms agreed on, and the policy was made out and signed the same day, being in force from noon of that day. The policy remained in the hands of the Company until the 27th of March, next ensuing. On the 26th of March the property was destroyed by fire, and on the following day the plaintiff went to the office of the Company, paid the premium, and obtained the policy. He did not disclose the fact of the property being burned up when he received the policy, and the defendant was ignorant of that fact



when the same was delivered. There was evidence tending to prove that when the application was made for insurance the insured told the agent that he could not pay the premium at that time, and that the agent informed him that, that would make no difference, that he would take his note for one, two or six months.

Plaintiff declined giving his note, but said he would have the money in a short time, when he would pay the premium in cash. When the application was returned to the office the policy was immediately made out and entered on the Company's books, as an insurance made and executed. It was still continuing in this condition when the plaintiff called, got the policy, and paid the premium. Whether the Company waived the right to have immediate payment, and extended credit, was a question of fact which should have been submitted to the jury, and the court erred in refusing the instructions in this respect. But the main point relied on and strongly pressed upon our attention, is the leading and controlling one, as to whether there was an actual contract of insurance. On the trial at Special Term the plaintiff asked two instructions on this subject, both of which were refused by the court. In one the court was requested to instruct the jury that, if they believed from the evidence that the plaintiff applied for the insurance on his property to the defendants on the 10th day of January, 1871, and on the same day the defendants proceeded to make out and sign the policy for said insurance, then the said defendants ratified the application, and their consent was complete; and further, if they find that the plaintiff paid the premium to the defendants on the 27th day of March, 1871, a day after the fire, and that the defendants then delivered the policy, and although the fact of the fire was not known to the defendants, the plaintiff was under no obligation to inform the defendants at the time he paid the premium, that the fire had occurred, and the jury should find for the plaintiff. The other instruction was a request to declare the law to be, that when the defendants accepted the premium and delivered the policy, the agreement to insure was

complete and executed, and related back to the day when the application was filed and the policy made out and signed, altho' building insured had been burned and destroyed by fire in the meantime.

The court, after the refusal of all the plaintiff's instructions, gave a declaration at the instance of the defendants, which utterly precluded the plaintiff from recovering. Plaintiff thereupon took a non-suit, and, failing to get the same set aside, he appealed to the General Term, where the judgment at Special Term was reversed and the cause remanded for a new trial. According to the principles established in the authorities above adverted to, the plaintiff's instructions should have been given. There can be no doubt but that the policy would have been delivered to the plaintiff and been regarded by the defendants as binding from noon on the 10th day of January, 1871, if the house had not been burned on the 26th day of March. And if it had been delivered it would have been valid from the time it was made to take effect. If it would have been valid, if no fire took place, I cannot see how the fact that a fire happened, invalidated it. There could be no justice in allowing the Company to construe it into a contract when it was to its advantage, and then repudiate it when it was disadvantageous. When the defendant accepted the premium and delivered the policy, the agreement to insure was complete and ratified as of the 10th day of January, 1871. The plaintiff had the right to rely on his agreement, and was not bound to voluntarily inform the defendants of the fire.

Wherefore, I think the judgment of the General Term should be affirmed and the case remanded for a new trial. The other judges concurring, except Judge Sherwood who is absent.

---

Bishop v. O'Connell, et al.

---

DAVID H. BISHOP, Appellant, *vs.* PATRICK O'CONNELL, *et al.*,  
Respondents.

1. *Fraudulent conveyances—Change of possession, what necessary under the statute.*—To render a sale of personal property valid as against creditors, etc., it must be followed by an actual and continued change of possession, and a change so open, notorious and unequivocal as to apprise the community that the vendor had ceased to be the owner of the property. (See Wagn. Stat., 281, § 10; *Claffin vs. Rosenburg*, 42 Mo., 439; *Lessem vs. Herriford*, 44 Mo., 323.)
2. *Sale of personal property—Change of possession—Reasonable time—What is.*—What will be a "reasonable time" for change of possession of personal property after sale, as meant by the statute (Wagn. Stat., 281, § 10,) must be determined by the circumstances of each case. No definite rule can be laid down.

*Appeal from St. Louis Circuit Court.*

*Slayback & Hæussler*, for Appellant.

*M. Kinealy*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action of replevin. From the record it appears that one Swainson owned a lot of ground on which there was a dwelling house containing furniture. On the last day of August, 1869, while indebted to several persons, he sold and conveyed the house and furniture by deed to the plaintiff, who, on the same day, leased the premises and furniture to him for the term of one year. Swainson still continued in the possession of the premises, house and furniture after the sale in the same manner as before, and there seems to have been no visible change made. He continued his residence in the same manner after the expiration of the lease till November 12, 1870, when defendant O'Connell, as constable, seized the furniture as his property, by virtue of several executions in his hands. Swainson then gave a delivery bond for the forthcoming of the property on a day specified, the plaintiff being one of the sureties on the bond. Immediately after the levy and seizure of the property under the executions against Swainson, the plaintiff instituted this action, claiming the furniture as his own. The trial at Special Term

was before the court and a jury, and the plaintiff had a judgment which was reversed at General Term, and the plaintiff has appealed the cause here.

Of the eight instructions asked by the defendant, the court gave two. The first told the jury that the sale of the property to plaintiff by Swainson was void as against the creditors of Swainson, unless it appeared from the evidence that such sale was accompanied by a delivery of the property sold in a reasonable time, regard being had to the situation of the property, and was followed by an actual and continued change of possession of the property prior to the levy under the execution by defendant O'Connell, and that such change of possession was open and notorious.

By the second, the court instructed the jury that unless the sale of the property mentioned in the petition, and claimed to have been sold to plaintiff by Swainson, was accompanied by a delivery of the property so sold to plaintiff within a reasonable time after the sale, regard being had to the situation of the property, and was followed by an actual and continued change of possession, and that such change of possession was so open, notorious and unequivocal as to apprise the community that Swainson had ceased to be the owner of the property, the sale was void as to creditors, and plaintiff could not recover.

At the instance of the plaintiff, the court instructed the jury that if they believed from the evidence that the plaintiff was, at the date of the bringing of this suit, and ever since, and prior to October 31, 1871, the owner, or lawfully entitled to the possession of the personal property described in the petition, then they should find for the plaintiff, with damages, &c. And unless they believed that the defendant, Swainson, owned the property, or was lawfully entitled to the possession thereof, then they should find for plaintiff.

The instructions given for the defendant are in the language of the statute in reference to fraudulent conveyances, and in precise conformity with the construction placed upon it by this court. (*Claffin vs. Rosenberg*, 42 Mo., 439; *Lessem vs. Herriford*, 44 Mo., 323.) What would be a reasonable time for the delivery of the goods, regard being had to

the situation of the property, must be determined by the circumstances of the case. No definite rule can be laid down. But there must be within a reasonable time, or as soon as circumstances will permit, an open and visible change of possession—a notorious transfer, which will inform the community that the property has changed hands.

The instructions for the plaintiff ignore these principles entirely. They make the sale and ownership of the property as between the parties to the transaction the test of title, without regard to what the statute declares to be void, in consequence of a retention of the possession by the vendor after the sale. These, taken with the oral declarations made by the judge who tried the case before the jury, that the statute did not apply where personal property was sold with real estate, was certainly calculated to mislead the jury.

The judgment at General Term should be affirmed. The other judges concur.

—o—

WILBUR F. BRINCK Appellant, vs. JOHN P. COLLIER, Respondent.

1. *Land—Dedication of to public use—Alley in rear of premises—Taxes and repairs on, paid by owner—Use of by public in connection with proprietor—Intention to dedicate—User.*—To constitute a valid dedication of land to the public there must be a clear intention on the part of the owner to dedicate; which may be established in various modes, some of which are provided by statute and others by such acts or declarations *in pais* as are satisfactory evidence of such design; and there must be an acceptance of such dedication by the public, either by *user* for a length of time more or less according to circumstances, or by its adoption by the public authorities.

The owner of land in St. Louis on which certain dwelling houses were built, left a way through the rear of the premises and connecting with a public alley, wide enough for the passage of vehicles, which space was at all times used by the tenants for taking in coal, supplies and the like, and removing dirt, etc. The city never exercised control over the passage, or declared it to be a public alley; but the owner when occasion required had it closed up against the public. *Held*, that although the public had for many years, frequently used the alley, as a matter of convenience in passing to and fro, such facts did not constitute a dedication of the alley to the public, or an acceptance of a dedication

by the public. The use by the community in such case was not an adverse but merely a permissive use in connection with, and in subordination to, that by the tenants. Hence the length of time through which the way was so used by the public would be of no importance.

*Appeal from St. Louis Circuit Court.*

*Voorhees & Mason, and S. N. Taylor*, for Appellant.

*Glover & Shepley, and Hitchcock & Lubke*, for Respondent.

I. The question of the dedication of private property to public use depends on the circumstances of each particular case. (*Smith vs. State*, 3 Zabr., 723; *Gamble vs. St. Louis*, 12 Mo., 617.)

II. To constitute such dedication, there must be first a plain, unequivocal intention to appropriate it to public use; (*Becker vs. St. Charles*, 37 Mo., 18; *Pennington vs. Willard*, 1 Rh. Isl., 93; *Missouri Inst., etc. vs. How*, 27 Mo., 211; *Smith vs. State*, *supra*; *Badean vs. Mead*, 14 Barb., 328; *Gould vs. Glass*, 19 Barb., 194; *Dill. Mun. Corp.*, 602; 3 Ed.) second, an acceptance by user or otherwise, by the public; third, if user is the only proof of dedication, it must be shown to be adverse and not subordinate to the owner, and with claim of right long enough to amount to prescription. (*Irwin vs. Dixon*, 9 How. U. S., 10; *Talbot vs. Grace*, 30 Ind., 389; *Smith vs. State*, *supra*; *Arstrott vs. Murray*, 22 Iowa, 469; *Dill. Mun. Corp.*, 604.)

III. The evidence negatives any such dedication.

IV. There is no evidence of any continuous or adverse user, such as is necessary.

V. In cities, to constitute an acceptance of dedication, there must be some action by the authorities from which a dedication may be presumed. (*Detroit vs. D. & M. R. R.*, 23 Mich., 209-10; *Holmes vs. Jersey City*, 1 Beasley, 308; *State vs. Carver*, 5 Strob., 217; *Baker vs. John*, 28 Mich., 319; *Irwin vs. Dixon*, 9 Howard, U. S., 33; *Page vs. Weathersfield*, 12 Ver., 424; *Blodgett vs. Royalton*, 14 Ver., 288; *Hyde vs. Jamaica*, 27 Ver., 454; *Holdane vs. Coldspring*, 23 Barb., 103.)



VI. From the time this pass way was left open, the whole matter of opening alleys, etc., had been left with the city alone; and no burden of this sort can be thrown upon the city save by competent authorities. (Renard 184, p. 95; City Charter, Feb. 1843, Art. 3, § 2, clause 8, Art. 6, § 1.)

NAPTON, Judge, delivered the opinion of the court.

This was an action to recover damages from the defendant for building on an alley, claimed by the plaintiff to have been dedicated to the public use by defendant's father. There was a verdict for defendant and judgment accordingly. It appears in evidence, that George Collier, the father of the defendant, owned the entire block lying between Fourth and Fifth streets, and St. Charles and Locust in the City of St. Louis, and previous to 1842, had sold out all the block, except 100 feet on Fifth street by 127 on St. Charles street. Immediately south of his lot, at the corner of Fifth and St. Charles, Mrs. Graham since about 1845, owned up to Collier's line and the plaintiff is, or was, a tenant under a lease from Mrs. Graham.

About 1845, Collier put up some houses on the St. Charles street front, and between these tenements and the residence of Mrs. Graham he left an alley 12 feet wide on his lot, thus actually occupying only about 88 feet on Fifth street, with his buildings and their appurtenances. There was a fence on the north side of this alley separating it from the buildings and their appurtenances, and this alley was open from Fifth street to a public alley bounding Collier's premises on the east, running north and south through the block. Collier owned all the land north of the alley including the alley, and Mrs. Graham's lot was the only one immediately contiguous to the alley on the south side. There was evidence to show that this alley was mainly designed for the convenience of Collier's tenants in the six houses he built along St. Charles street, and that it was used by said tenants to haul wood and coal to their houses, and to remove ashes and other rubbish therefrom; and it also abundantly appeared that it was open, without gates, and used therefore by the public for a foot way and for carts whenever occasion presented, without objection from

Collier or his tenants; and that this user continued up to the removal of the buildings in 1870, a period of about twenty-five years.

At one time Mr. Collier, or his representatives, enclosed the ends of this alley with gates for a short time, to enable him to make some repairs on the buildings or fence adjoining it. After it became, by accumulations of mud, &c., inconvenient or difficult to pass over, he had the alley paved and kept the pavement in repair at his own expense. He paid taxes on it during all this time as a part of his lot. The city authorities never exercised or attempted to exercise any control or superintendence over it as a public alley—but taxed it as a part of Collier's property.

These facts were established by a great number of witnesses; but as they were grouped together in an instruction and thus passed on by the jury, it will not be necessary to give any details of the evidence; and this instruction presents really the only question in the case, and is as follows: "If the jury believe from the evidence that George Collier, prior to 1840, owned the whole of block 98 of the City of St. Louis, and shortly after that year conveyed the east half of said block fronting on Fourth street, to parties who commenced building thereon, and about that time there was an alley opened through said block extending north and south from Locust to St. Charles street, which alley was in 1844 or 1845, declared by the City of St. Louis to be a public alley; and about the year 1843, said Collier sold and leased to other parties the south-west portion of said block, leaving in himself a lot in the north-west corner of said block containing a front of about 100 feet on Fifth street, and running east to said alley; that in about the year 1845, said Collier erected on said last mentioned lot a row of houses fronting on St. Charles street, and extending from Fifth street to said alley; and that for the purposes of enabling the occupants of said houses to get their coal, wood and other supplies, and to remove their dirt, slops and ashes, he left open a way wide enough for the passage of vehicles in the rear of said houses through their whole extent, and that such way was at all

times used by said occupants for some or all of said purposes; that said way was always improved, paved and kept in order by said Collier and those claiming under him, and the City of St. Louis never exercised any dominion, care or control over the same, nor improved it or declared it to be a public alley; that from the time of the building of said houses by said Collier, the City of St. Louis always assessed said way as a part of said lot to said George Collier and those claiming under him for taxes, and they paid taxes thereon; that those claiming said lot under George Collier, about the year 1857 or 1858, fenced up said way at the east and west ends thereof, and prevented any entrance thereto for a week or more, then the jury are instructed that although they may find that for more than 20 years before 5th of May, 1870, other persons than the occupants of said house occasionally or often used said way as a matter of convenience in passing from Fifth street to said alley, running from Locust street to St. Charles street, or from said alley to said Fifth street, yet that no dedication of said way to public use has been shown as a matter of law from the facts above stated."

A number of instructions were asked by the plaintiff, but as they embrace propositions just the counterpart of the one given, an examination of the propriety of the instruction already quoted, will necessarily determine the question of law involved in the case.

There have been several cases determined by this court in relation to this question, viz: *Gamble vs. the City of St. Louis*, 12 Mo., 618; *Stacy vs. Miller*, 14 Mo., 478; *Hannibal vs. Draper*, 15 Mo., 634; *Missouri Institution, etc., vs. How*, 27 Mo., 211; *Becker vs. St. Charles*, 37 Mo., 14; *Rutherford vs. Taylor*, 38 Mo., 315.

An examination of these cases will show that while there is a concurrence in regard to the leading principles governing the subject, the application of these rules to particular cases depends very much on the peculiar facts of each case. To constitute a valid dedication of land to the public, there must be a clear intention on the part of the owner to dedicate, which may be established in various

modes, some of which are provided by statute, and others by such acts or declarations *in pais* as are satisfactory evidence of such design; and there must be an acceptance of such dedication by the public, either by user for a length of time, more or less, according to circumstances, or by its adoption by the public authorities. Greenleaf says there must be the act of dedication and the acceptance of it by the public. "If accepted and used by the public in the manner intended, it works as an estoppel *in pais* precluding the owner, and all claiming in his right, from asserting any ownership inconsistent with such use. The right of the public does not rest upon any grant by deed nor a twenty' years possession; but upon the use of the land with the assent of the owner for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." Again the same author says: "It" (the question of dedication) "is a question of intention, and therefore may be proved or disproved by the acts of the owner, and the circumstances under which the use has been permitted. The evidence of dedication of a way may be rebutted by proof of any acts on the part of the owner of the soil, showing that he only intended to give license to pass over his land, and not to dedicate a right of way to the public."

These general principles, though by no means easy of application, seem to be well settled by repeated adjudications, both in England and the United States; but a review of the cases, or even a reference to them by their titles, would be superfluous labor, since they may be found in the text books on this subject and are cited in several elaborate opinions referred to in the briefs of the counsel in this case.

I will refer only to one or two cases which in their facts seem particularly analagous to the present:

The case of *Irwin vs. Dixon* (9 How., 10), is in many respects like the one now under consideration. In that case, there was an application for an injunction to prevent the defendants from building on what was assumed to be a public highway, and the main ground of the relief sought was based upon an alleged dedication to the public. There had been a use of the

ground by the public for more than thirty years, as a highway, and this user was claimed to be a dedication by the owner. But the court declared the law to be, that this user, in order to constitute a dedication, must have been made under such circumstances as to indicate an abandonment of the use exclusively to the community.

The court held, that a dedication must rest on the clear assent of the owner—to be proved by a deed, or unsealed writing, or by acts inconsistent and irreconcilable with any construction except such assent;—and the court held, that the mere fact of user by the public did not constitute a dedication where such user was merely incidental to the convenience of the owner, who would not be captious in preventing others from traveling the same road so important to himself. The fact that the owner continued to pay taxes on it as private property, and that the city continued to assess taxes on it to the owner; that the owner made repairs on it, when needed for their own use and advantage, instead of its being repaired by the city, as was done with public highways—was regarded as conclusive, that neither the owner or the public considered the road as dedicated to the public.

The doctrine in 3 Kent's Com., 444, that the use must be adverse to the owner, and that the use must be exclusive, is referred to and sanctioned.

The case of *The People vs. Beaubien* (2 Douglass, 269), was an indictment for obstructing a public highway; but the question turned altogether upon the point whether there was a highway by dedication, and upon this point a multitude of English and American cases were reviewed.

The proprietor had laid out an addition to the City of Detroit, and on his plat had marked a "street leading to the burying ground," but the city had never recognized this street, and had in fact constructed other streets leading to the cemetery; and the court held, without deciding upon the rights of purchasers of lots according to the plat, that there was no dedication by estoppel *in pais*, so far as the public were concerned, because the Common Council of Detroit, who had charge of the streets of that city, and the power of opening or laying

out new ones, had never accepted or adopted this as a street, and therefore, conceding that the intent to dedicate was clear, there was no acceptance and no such user of a street as would consummate the dedication.

The same principle is distinctly asserted in *Page vs. Weathersfield* (13 Verm., 429). There the court declares that a public road is one laid out by proper authority, and where there is no formal and regular designation of such road, its existence may be shown by its recognition by the public authorities, such as causing repairs to be done on it or authorizing the surveyors to collect and expend the highway tax on it; but the Chief Justice says: "I know of no way in which an individual can lay out a public highway for his own benefit and compel the town to accept it as such." And this case was quite analagous to the present, though relating to a county highway, and not to a street or alley in a city, as will appear from the concluding paragraph in the opinion, which is as follows: "The owners of the mill opened a passage from the highway to their mill, and have used it for the benefit of themselves and their customers; have repaired it from time to time, and the town have done no highway work thereon. The selectmen could neither discontinue it as a passage, nor shut it up, nor control it in any way. It commenced at the highway and terminated at the mill. Whenever the owners of the mill have no further use for it, they may fence it up without the consent of the selectmen or consulting them, and while they want to use it for the same purposes as heretofore, the selectmen cannot interfere with their right to do so. No one of the numerous authorities read, affords any countenance to the idea that this passage was a public highway which the town were bound to repair, or for the insufficiency of which they were liable to the suit of an individual injured."

Assuming these principles to be correct, we have no difficulty in saying, that upon the facts found by the jury in this case, there was no dedication by the proprietor, nor any acceptance of such dedication by the public, had there been shown an intention to dedicate it by the proprietor.



All the facts proved are entirely consistent with an intention on the part of Collier to retain his rights of property in the way opened; but some of them are entirely inconsistent with the hypothesis of an intention to dedicate.

His declarations to the witness, Bredel, and his subsequent acts, continued during his life-time, of paying taxes on this ground and keeping the way in repair at his own cost, and subsequent similar acts by his successors, with occasional assertions of exclusive right to use the same, whenever their proprietary rights rendered it necessary or convenient, are all inconsistent with the hypothesis of an abandonment of title to the public, and the occasional or constant use of the way by the public in connection with this use by the proprietor and his tenants, is not such an user as indicates an acceptance of a dedication. There was nothing adverse in such user, nothing more than a permissive use, or what is termed a license.

The case of *Gamble vs. The City of St. Louis*, (12 Mo., 620) which is relied on as authority for a dedication in the present case, was different in its facts in several important particulars. There, the alley ran entirely through the block, and was adopted by all proprietors of lots on either side, of whom Gamble was only one. The city authorities reported it as a public alley and took charge of its improvement and repairs. There could be no question of an acceptance by the public of the way as an alley, and whatever might have been the original design of the proprietor, who complained, and of the other proprietors who accepted the plan and adapted their improvements to it, its abandonment would obviously have interfered both with public convenience and private rights. In the case now under consideration, there was already a public alley through the entire block, paved and kept in repair by the city authorities, and it may well be questioned, as it was in the Vermont case cited, whether the city can be burdened with the expense of keeping open and repairing any additional number of alleys or streets which the convenience or caprice of an owner might suggest.

In dedications as in all other implied contracts, there must be the assent of two parties—the proprietor of the ground

and the public—and where the public is represented by duly constituted agents, invested with full power to determine upon the propriety or necessity of a proffered dedication, the dissent of such authorities must be a very material fact in determining whether the proprietor has been divested of his title or not.

In the Beaubein case referred to, there was no question of the intent of the proprietor to dedicate—but that intent was frustrated by the action or non-action of the city authorities of Detroit—who were invested with power to determine what highways they would recognize as streets, and be at the expense of paving, lighting and sewerage.

In this case the facts show no intention to dedicate, and no such user by the public as would imply a loss of title in the owner. The length of time during which the way was used amounted to nothing, since the user was subordinate to the proprietary rights. A lot in a city might be left unimproved, and roads through it diagonally might be used for any length of time, but such user would not be claimed as establishing a street. And so in this case the user was manifestly subordinate to the rights of the proprietor, and not adverse to his ownership.

The judgment is affirmed, the other judges concurring.

—o—

EVERETT W. PATTISON, Administrator *de bonis non* of the estate of PHILIP GIBSON, deceased, Plaintiff in Error, vs. EDWARD COONS, Defendant in Error.

1. Administrator must determine for himself whether fund belongs to estate of deceased—Parol evidence, when proper, etc.—An agent credited to the account of the husband, the proceeds derived from the sale of certain lands belonging to the wife, and turned the sum over to the administrator of the husband, Held that the administrator properly refused to be governed by the books of the agent, and was right in not charging himself with that amount. He was authorized to determine for himself to what fund it belonged. And the fact might be shown by parol evidence.

---

Pattison, Adm'r, v. Coons.

---

*Error to St. Louis Circuit Court.**E. W. Pattison*, for Plaintiff in Error.*Cline, Jamison & Day*, for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

The plaintiff in this case as the administrator *de bonis non* of the estate of Philip Gibson, deceased, brought this action to surcharge the final settlement made by the defendant as the former administrator of said estate, on the ground that defendant, as such administrator, had received nine hundred and sixty-two, 61-100, dollars as assets of said estate, which he had fraudulently failed to inventory as assets belonging to said estate, and had in his final settlement with the Probate Court, after having been removed from said office of administrator, fraudulently withheld said sum and failed to charge himself therewith, thereby defrauding said estate of said sum, etc.

The facts charged in the plaintiff's petition were denied by the defendant's answer. The facts of the case as shown by the bill of exceptions, are about as follows: Philip Gibson prior to the year 1863, was the owner of a small tract of land, at or near the City of St. Louis, in St. Louis county, Missouri; that said land was laid out into town lots, in said year of 1863, and was called, Gibson's addition to the City of St. Louis. In that year, one E. G. Obear, who was a land agent in St. Louis, was employed by said Gibson, to act as his agent in making sale of these lots. Obear had from time to time, made sale of lots or portions of said land through the year 1863, and the forepart of 1864. On the 6th day of May, 1864, Philip Gibson by deed of that date, conveyed to his wife Elizabeth Gibson, a considerable number of these lots, or in other words, he conveyed the lots to the agent Obear, to be held in trust for the sole and separate use of said Elizabeth, free from the control of her husband, and to be sold at her discretion, the proceeds to become her property free from the control of her husband. After this deed, Obear continued to act as the agent of Philip Gibson as well as the trustee for the said Elizabeth as to the lots conveyed to him for her. He sold a num-

ber of the lots belonging to Philip Gibson, as well as several of the lots conveyed to him in trust for said Elizabeth.

Obear had in 1863, opened an account on his books with Philip Gibson in which he made entries of amounts received by him, for lots sold for Philip Gibson, and credited himself with amounts paid out to, or for said Gibson; and after the lots had been conveyed to Obear, in trust for Elizabeth Gibson, he sold several of said lots for her, and in place of opening another account in her name, he entered the amounts received for the lots sold for her use, in the same account opened with Philip Gibson as aforesaid. This account was read in evidence, from which it was shown that various amounts had been paid out to Philip Gibson, amounting in all to several thousand dollars, and that there was still in the hands of Obear, the sum of nine hundred and sixty-two dollars and sixty-one cents. It was also shown, that a larger sum had been received by Obear for lots sold by him, which were held by him in trust for Elizabeth Gibson, than the whole amount still remaining in his hands, and there was no evidence to show that any sum whatever had been paid by Obear to Elizabeth Gibson.

In this condition of affairs, in the latter part of the year of 1865, both Philip Gibson and Elizabeth Gibson died, and the defendant being a neighbor of the parties, took out letters of administration on the estate of each, and entered upon his duties as such. After taking out letters of administration he applied to Obear for the money remaining in his hands for the sale of lots as aforesaid. The defendant being the administrator of both estates, and knowing that Obear had been selling lots, both for Philip Gibson and Elizabeth Gibson, inquired of Obear, or his clerk, whether the money on hand had been received for the land of Philip Gibson sold by him, or for lands held for him in trust for Elizabeth Gibson. After the account was examined by the clerk of Obear, he told defendant that the money had been received for the lots held in trust for Elizabeth Gibson. The money was then paid over to defendant who placed the amount thereof, (\$962.61-100,) on the inventory of the estate of Elizabeth Gibson, and failed to credit any part thereof to the estate of Philip Gibson, and

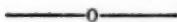
made his settlement of the estate of Philip Gibson without charging himself with said amount. Defendant was removed by the Probate Court from his office or trust as administrator of the estate of Philip Gibson, deceased, and plaintiff appointed as administrator of said estate in his place, after which defendant appeared in the Probate Court and made his final settlement with said estate, still failing in any way to charge himself with said sum, of \$962,61-100, received of Obear, or otherwise accounting for the same in said final settlement. It was this final settlement that is sought to be set aside in this suit, and the only fraud charged, or attempted to be proved, is the fraudulent failure of defendant to inventory said sum of money, as part of the effects of the estate of Philip Gibson deceased, and his not charging himself therewith in his final settlement. The court at Special Term found the issues for the defendant and rendered a judgment in his favor. From this judgment the plaintiff appealed to the General Term of the St. Louis Circuit Court, where the judgment of the Special Term was affirmed, from which the plaintiff appealed to this court.

The only question which seems to have been considered by the court below, and I apprehend the only question necessary to be considered here, is, whether the money paid the defendant by Obear, properly belonged to the estate of Philip Gibson, or the estate of Elizabeth Gibson. It is insisted by the plaintiff, that as the money in Obear's hands, was credited to the account of Philip Gibson, the administrator was thereby bound to carry the same into the assets of the estate of Philip Gibson, and that he had no right or power to decide that the money belonged to Elizabeth Gibson; and that the court below erred in permitting parol evidence to be introduced to show that the money really belonged to Elizabeth Gibson as her separate property. This position I think cannot be maintained. When the money was found in Obear's hands, under the circumstances shown by the evidence, the defendant was bound to decide as to which estate it belonged. It is true his decision would not be final. It was made at his peril. If he had decided wrongly, his decision could not be

binding on the representatives of Philip Gibson, or anybody else interested.

The account on Obear's book, by which the amount was entered to the credit of Philip Gibson, as between Obear and the administrator, would be *prima facie* evidence against Obear, but in any event parol evidence was admissible to show to whom the money really belonged. The account was entered on Obear's books for his own convenience. There is nothing to show that Elizabeth Gibson had authorized him to credit her money to her husband's account, or that she ever knew how it was entered. As to her, then, these entries would not prevent her from showing by parol evidence that the money really belonged to her, and her administrator succeeded to her rights and might do the same. The Circuit Court found that the money did not belong to the estate of Philip Gibson and I think the evidence fully sustains the finding.

The judgment will therefore be affirmed. The other judges concur.



JOHN H. SCHAABS, Plaintiff in Error, vs. THE WOODBURN SARVEN WHEEL COMPANY, Defendant in Error.

1. *Negligence, immediate and proximate cause of injury—Recovery in case of, negligence of plaintiff; of both parties.*—No one can recover for an injury of which his own negligence in part or in whole was the immediate and proximate cause. Where the negligence of both parties was the proximate cause, neither can recover.
2. *Practice, civil—Verdict—General finding for defendant sufficient, unless in case of counter-claims.*—It is not necessary to find separately for defendant on each count. A general finding for defendant embraces all the issues and is in effect the same as finding each issue for him. This rule may not apply where the answer contains distinct and separate counter-claims.

*Error to St. Louis Circuit Court.*

*Hitchcock, Lubke & Player*, for Plaintiff in Error.

*S. N. Taylor & Hamilton Moore*, for Defendant in Error.



---

Schaaba v. Woodburn Satven Wheel Co.

---

ADAMS, Judge, delivered the opinion of the court.

This was an action for damages occasioned by the collision of plaintiff's and defendant's wagons on 14th street in the City of St. Louis.

The plaintiff's petition charges that the accident occurred by the negligence of defendant's driver, and contains two counts; one claiming damages for injuries to plaintiff's wagon and the other for injuries to his person. The answer of defendant denied all negligence on the part of its driver, and charged that the accident occurred by plaintiff's own fault.

The plaintiff's wagon was a light one horse vehicle, the defendant's, a large platform transfer wagon. The evidence was contradictory. On the part of the plaintiff, it tended to prove his case, and on the part of the defendant, it conduced to prove that the plaintiff himself was the occasion of the collision.

The plaintiff asked an instruction, which was given, telling the jury to find on each count if they found for plaintiff. The court then gave on its own motion one instruction, and four at the instance of the defendant, which are as follows:

Instruction for plaintiff given by the court on its own motion.

"The jury are instructed that the plaintiff is entitled to recover against the defendant in this case, if, from the evidence adduced before them, they believe that the plaintiff was the owner of the horse and wagon which he was driving, at the time of the collision with defendant's team; that he was driving the same with proper care and caution upon the public streets of the City of St. Louis; that the defendant's driver through carelessness or unskillfulness drove the defendant's team against plaintiff's wagon, and that plaintiff in direct consequence of such collision was injured in his person or property as alleged in the petition."

Instructions given for defendant.

1. "The court instructs the jury that the gist of plaintiff's action in this case is negligence, and the plaintiff cannot recover unless the evidence shows a case of negligence on the

part of the defendant, and if the jury find from the evidence that both parties, by their negligence, immediately contributed to produce the injury, the plaintiff cannot recover, and the verdict should be for the defendant.

2. "The court instructs the jury that if they find, from the evidence, that, at the time of the collision between the wagons of plaintiff and defendant, the team of defendant was moving on a walk, and near the east side of Fourteenth street, and that there was a wide space open to the west of the defendant's wagon, and that the street was clear and unobstructed on that side, so that plaintiff, before the collision, by reasonable care and diligence could have reined his horse to the left, and thus avoided the accident, and that it was owing in part to plaintiff's carelessness and negligence in not so reining his horse that the accident was caused, they should find for the defendant."

3. "The court instructs the jury that if they find from the evidence that the immediate cause of the plaintiff being thrown from his wagon and receiving the injuries complained of, in his second cause of action, was his holding to the lines after his horse broke loose from his wagon, the verdict should be for the defendant on said count, even though the jury should find for plaintiff on his first cause of action."

4. "Though the jury believe, from the evidence, that the wagon of the defendant was on the wrong side of the road, yet if there was plenty of room for plaintiff to pass it, without a collision, by reining his horse a little to the other side, and that plaintiff was careless and negligent in not so reining his horse, he cannot recover, and the verdict should be for the defendant."

The plaintiff objected to the instructions given for defendant and excepted to the ruling of the court. The court refused the following instruction asked by plaintiff, and he excepted.

"The jury are instructed that the plaintiff is entitled to recover against the defendant in this case, if, from the evidence adduced before them, they believe that the plaintiff was the owner of the horse and wagon which he was driving at

---

Schaabs v. Woodburn Sarven Wheel Co.

---

the time of the collision with defendant's team; that he was driving the same upon the public streets of the City of St. Louis; that the defendant's driver through carelessness or unskillfulness drove the defendant's team against plaintiff's wagon, and that plaintiff, in direct consequence of such collision, was injured in his person or property as alleged in the petition. And the jury are further instructed that it makes no difference whether the plaintiff was driving slow or fast, if the jury also believe that the defendant's driver could have avoided the happening of the accident, and that the plaintiff did not contribute to it."

The jury found a verdict for the defendant. The plaintiff filed a motion for a new trial which was overruled. He also filed a motion in arrest, upon the alleged ground that the verdict of the jury was a general verdict in favor of defendant on the whole petition, and not a separate finding on each count of the petition. This motion was also overruled and final judgment rendered for defendant which on appeal was affirmed by the General Term and the plaintiff has brought the case here by writ of error.

1. I see no error in the instructions upon which the case was tried. They presented the whole case fairly to the jury on both sides. The question of contributory negligence on the part of the plaintiff, was the only material issue raised by the pleadings and evidence. No one can recover for an injury of which his own negligence in part or in whole was the immediate and proximate cause. This seems to be the settled law of this State. (See *Morrissey vs. The Wiggins Ferry Co.*, 43 Mo., 383, and the authorities there cited.)

2. The instruction asked by the plaintiff, and refused by the court, in the concluding paragraph was manifestly erroneous. It enunciates, in effect, the doctrine that the plaintiff had the right to run his own vehicle at the most furious rate of speed, and that it was the duty of the defendant at all hazard, to keep out of his way if he could possibly do so. It would not do for the defendant to stop his wagon leaving room for the plaintiff to pass, but he must if possible, yield the whole street to avoid a collision. This is not the law. It was the

duty of both parties to drive at a moderate rate on the streets, and to use due care to prevent a collision. If both were in fault and the negligence of both was the proximate cause of the collision, neither can recover for an injury produced thereby.

The verdict of the jury was in fact a finding on both counts, inasmuch as it found all the issues for the defendant. It was not necessary to find separately for the defendant on each count. A general finding for defendant embraces all the issues and is precisely the same as finding each issue for the defendant.

Sometimes a general finding for plaintiff of a certain amount, where there are several counts for entirely distinct causes of action, may not be proper. But in regard to the defendant, such finding is always proper, unless the answer consists of distinct and separate counter-claims; then in some cases the finding on the counter-claims ought to be separate. On the whole record, the judgment appears to be for the right party.

Judgment affirmed. The other judges concur.

—o—

JAMES G. BARRY, Respondent, vs. PROSPER OTTO, *et al.*, Appellants.

1. *Limitations, statute of—Adverse possession—Action of ejectment by possessor—Title of Government, presumption as to.*—Ten years adverse possession, except as against the Government and parties laboring under disabilities, is not only a bar under the statute of limitations, but creates in the possessor an affirmative title under which he may maintain ejectment. And such possession will raise a presumption that the title has emanated from the Government and vested in the holder.
2. *Ejectment—Disputed boundary lines—Whether covered by certain deeds, question for jury*—In ejectment for land between disputed boundary lines, the question whether a deed under which plaintiff claimed covered the strip in controversy was held to be one of fact for the jury.

*Appeal from St. Louis Circuit Court.*

*S. Simmons*, for Appellants.

I. The court is bound to know judicially that the legal title to the land in question is in the United States and there remains until it is divested by patent or grant. (3 Washb. Real Prop., 168; Carman vs. Johnson, 20 Mo., 108; Gibson vs. Chouteau, 13 Wall., 93.)

II. The rule of the common law that the defendant in an action of ejectment may show an outstanding title in a third person to defeat the suit of plaintiff, is not changed by the statute. (Gurno vs. Janis, 6 Mo., 330; Keene vs. Barnes, 29 Mo., 377; Forder vs. Davis, 38 Mo., 107; Foster vs. Evans, 51 Mo., 39; Wagn. Stat. title "Ejectment" with foot notes.)

*Krum & Patrick*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment for a lot in the city of St. Louis. The plaintiff and defendants claimed to be owners respectively of two adjoining lots, and the contest was as to the boundary line between their lots. The ground in dispute was a strip of ten or eleven inches wide by the length of the lots one hundred and twenty-seven and a half feet. Both parties introduced deeds of conveyance for the purpose of showing the boundaries of their respective lots from the same original grantor. The plaintiff claimed title to the *locus in quo* by adverse possession for more than ten years before the entry and ouster by defendants, and the material question was whether his possession was really an adverse possession, or whether it was taken and maintained by accident or mistake.

Each party gave evidence conducing to prove their respective theories. The plaintiff's evidence showed that he had held possession up to the line claimed by him for thirty years, partly by means of a house built on the line, and by a fence extending from the house along the remainder of the line. He held this possession up to 1869, when the defendants entered upon and took possession of the strip of land in dispute as belonging to their lot.

The court instructed the jury on the questions of adverse possession and possession by mistake as raised by the evidence. These instructions presented the material issues fairly to the jury, and no serious objections are raised to them here.

But the defendants asked the court to instruct the jury that the deeds read in evidence by the plaintiff showed no title in him; and also that upon the evidence given the plaintiff could not recover, because he had not proven that the United States had parted with their title. The court refused these instructions. A verdict and judgment were rendered for plaintiff; the General Term affirmed the judgment, and defendants have appealed to this court.

I. The plaintiff relied on adverse possession for more than ten consecutive years as an affirmative title. It is too well settled to need illustration or authority that ten years adverse possession, except as against the Government and parties laboring under disabilities, is not only a bar under the statute of limitations, but it creates in the possessor an affirmative title upon which he may maintain ejectment.

It is equally well settled, that a party in possession of land claiming it as his own, is presumed to be the true owner till the contrary appears. And therefore, if a party remains in the adverse possession a sufficient length of time to create an affirmative title under the statute of limitations, the title from the Government, in the absence of proof to the contrary, will be presumed to have emanated and vested in him. (*Davis vs. Thompson, ante, p. 39.*)

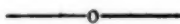
II. The plaintiff and defendants claimed separate adjoining lots from the same original source of title; the only dispute being as to the boundary line between the two lots.

The question, whether the deeds under which the plaintiff claimed covered the strip of land in controversy was a question of fact for the jury, and not for the court to determine. The plaintiff introduced his deeds to show the limits and extent of his claim and not as muniments of title. The court, therefore, very properly refused the declaration that the plaintiff's deeds showed no title in him. This refusal was



proper, not only because the deeds were not relied on as the only source of title, but because under the facts of this case the proposed instruction usurped the province of the jury in assuming that the deeds did not cover the land in dispute.

Judgment affirmed; Judge Sherwood absent; the other judges concur.



CATHERINE H. COCKER, Appellant, vs. JOHN COCKER, Respondent.

1. *Practice, civil—New trial—Motion for before judge succeeding the one trying cause, etc.*—The action of a judge in overruling a motion for a new trial, etc., on the ground that the case having been heard before his predecessor he was ignorant of the merits, is error. In such state of facts he should have granted a new trial. (*Woolfolk vs. Tate*, 25 Mo., 597.) Generally, in a case of this character costs should be taxed against the party filing the motion.

*Appeal from St. Louis Circuit Court.*

*Dryden & Dryden*, for Appellant.

*Voullaire & Sternberg*, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought by the plaintiff against the defendant in the St. Louis Circuit Court, to recover the amount purporting to be due on a promissory note executed by the defendant to the plaintiff. The defendant by his answer set up as a defense to the action, the allegation that the note had been executed without any good consideration, and also that it was barred by the statute of limitations. The plaintiff replied to the new matter in the answer, denying the same, and also setting up new matter in avoidance. The answer and reply are each very long and prolix in their averments; but for the purposes of a proper understanding of the case as presented in this court, it is not necessary that they should be further noticed.

In the Circuit Court at Special Term a jury was waived and a trial of the issues in the case was had before the court. The issues were found for the plaintiff and judgment rendered in her favor.

The defendant in due time filed his motion for a new trial. After this motion was filed and before it was heard or decided, the judge who tried the cause, (the late Judge Ewing), vacated his office by resignation, and the present incumbent, Judge Krum became his successor in office. The motion for a new trial set out as grounds of the motion that the finding and judgment of the court was against the evidence and against the weight of the evidence; that the court admitted improper evidence; that the court had improperly declared the law; and that the finding and judgment were not warranted by the law or evidence, and were excessive. This motion was afterwards called up for hearing before the present judge of the court, and was by him overruled.

The following facts appear from a bill of exceptions filed at the time the motion was overruled: "That before the motion for a new trial was disposed of, Judge Ewing, before whom this case was tried, vacated the bench without disposing of said motion for a new trial; that on the 18th day of January, 1873, the above motion for a new trial came on to be heard, Judge Krum the successor of Judge Ewing presiding, and not having heard the testimony and evidence of the case, and not being advised therein, and without passing upon the merits of said motion, and there being no certificate from Judge Ewing as to what the evidence on the trial was, and it being stated to the court by the respective counsel that they had not agreed as to what the evidence or testimony was, the court refused to grant a new trial and overruled the motion for a new trial, to which action of the court in refusing to grant a new trial, and in overruling said motion for a new trial, the defendant by his counsel at the time excepted."

The defendant then appealed to the General Term of said court where the judgment at Special Term was reversed and the cause remanded to Special Term for further proceedings. From this last judgment the plttf. appealed to this court.

The only question to be considered in this court is, whether the Circuit Court at Special Term properly overruled the defendant's motion for a new trial? We think the exact question in this case was decided by this court in the case of *Woolfolk vs. Tate*, (25 Mo., 597). In that case a motion for a new trial was filed, but before it was heard, the county where the case was pending was attached to a different circuit, and the motion came on for hearing before a different judge from the one who had tried the cause. The grounds of the motion were that the court had admitted illegal evidence, and that the verdict was against the weight of the evidence. The record shows that in that case the judge who overruled the motion did so on the ground, "that the cause having been tried before Judge Wells, and the judge trying the motion not having heard the evidence as delivered by the witnesses on the stand, and not having the opportunity which the jury had to decide on the credibility of the witnesses, by the manner in which the evidence was given, the court is unwilling to disturb the verdict on the ground that it is against the weight of the evidence."

This court in that case held that a party to a suit, "has the same right to have his motion for a new trial heard and duly considered as he has to institute or defend an action." The learned judge delivering the opinion of the court in that case further remarking, that "it is better to allow a new trial where the court for any cause cannot consider the merits of an application for that purpose, than to refuse it; for by denying the motion without giving the party the benefit of being heard, or of having his reasons considered, irreparable injury may be done, while on the other hand, the prevailing party in the verdict will only suffer by delay and will generally secure another verdict if he is entitled to it." Of course the motion in such case would usually be sustained on terms taxing all of the costs of the first trial to the party filing the motion.

The case now before us I think is identical in principle with the one above referred to. In fact, the present case is a stronger one, as in that case the attorneys seemed to have agreed as to what the evidence had been on the former trial.

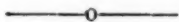
---

Blobsaum v. Gambs, Adm'r.

---

In this case no such agreement could be obtained, and if, as is suggested, the motion had been tried on affidavits, then the court would not have decided the motion on the weight of the evidence given on the trial, but on the weight of the *ex parte* affidavits taken and used on the trial of the motion. We think that the rule of practice has been settled in the case of *Woolfolk vs. Tate*, and we are not disposed to change it.

The judgment rendered by the Circuit Court at General Term will be affirmed, and the cause remanded to Special Term for further trial. The other judges concur.



HENRY BLOBAUM, Appellant, *vs.* HENRY GAMBS, Public Administrator in charge of estate of MICHAEL SLATTERY, deceased, Respondent.

1. *Replevin vs. Constable's Adm'r—Competency of plaintiff as witness—Constr. Stat.—Surplus fund—Creditors.*—In replevin by a third party against a constable for goods seized under execution, where the constable died after suit was commenced and his administrator was substituted as a party, the plaintiff then ceased to be a competent witness under the statute. (Wagn. Stat., 1871-2, § 1.)

In such proceeding, judgment being given in behalf of defendant for the value of the property, any surplus after satisfying the execution debt, may be seized by the other creditors. Plaintiff in the replevin cannot hold it.

*Appeal from St. Louis Circuit Court.*

*Hitchcock, Lubke & Player*, for Appellant.

I. Plaintiff was not a stranger to the title. The sale, *inter partes* was good. If void as to creditors, it was void only as to the amount of the execution. (*Dilworth vs. McKelvey*, 30 Mo., 149; *Fallon vs. Manning*, 35 Mo., 271; *Frei vs. Vogel*, 40 Mo., 149.)

II. Plaintiff was a competent witness. The "cause of action" in this suit was the fraud alleged in Slattery's answer to make his levy valid. The parties to that fraud were plaintiff and Rottinghaus. The constable was no party thereto.

(See also Garvin's Adm'r vs. Williams, 50 Mo., 207; Moore vs. Moore, 51 Mo., 119; Spradling vs. Conway, 51 Mo., 51; Whaling vs. Peck, 49 Mo., 82.)

*Jecko & Hospes*, for Respondent.

I. Plaintiff was incompetent. (Wagn. Stat., 1371-2, §1.) If the bill of sale be the "cause of action," Rottinghaus being dead, the plaintiff—grantee therein—cannot testify. If the alleged trespass of the constable be "the cause of action," then the constable being dead, plaintiff—the other party there—cannot testify.

II. Plaintiff was an entire stranger without any title to the surplus. (Frei vs. Vogel, 40 Mo., 149; Fallon vs. Manning, 35 Mo., 271.)

ADAMS, Judge, delivered the opinion of the court.

This was an action of replevin. The petition alleged that the plaintiff was the owner of the personal property, and that defendant unlawfully detained the same.

The answer denied plaintiff's ownership, and set up, that defendant was the owner by virtue of a levy of an execution by him, as constable, on the same, as the property of one Rottinghaus, the defendant in the execution; that plaintiff's alleged claim to the property was fraudulent and void as to the creditors of Rottinghaus.

The plaintiff by replication denied the new matter set up in the answer. Before the trial, defendant died and his administrator was made a party. On the trial, the plaintiff offered himself as a witness to prove the issues on his side; but he was excluded because the defendant, Slattery, was dead, and to this action of the court the plaintiff excepted.

The execution, under which the defendant as constable claimed the property, was for two hundred dollars. In his answer the defendant demanded judgment for the return of the property which had been delivered to the plaintiff, or for the value thereof. The case resulted in favor of the defendant, and the court sitting as a jury, assessed the value of the property at four hundred dollars and defendant's damages at one

cent; and the defendant elected under the statute to accept the value of the property in lieu of the property itself, and the court gave judgment in favor of the defendant for the value, (\$400.00), against the plaintiff and his sureties on the bond for the return of the same, and for one cent damages and the costs.

The plaintiff objected to the amount assessed as the value of the property upon the ground that the defendant's interest in the same was only the amount of the execution, \$200.00. But the court overruled the objection and the plaintiff excepted.

A motion for a new trial was overruled and final judgment rendered against the plaintiff, which was affirmed at the General Term, and plaintiff has appealed to this court.

The plaintiff was not a competent witness under our statute, to prove any facts to establish his ownership of the property. Whether he was the owner or whether the defendant himself, by virtue of his levy of the execution, became the owner, was the only matter in issue and on trial in this suit. The defendant, Slattery, who had died, was certainly a party to this issue. He denied the ownership of the plaintiff and alleged property in himself, as constable, by virtue of the levy of the execution. The only question in issue, was as to the ownership of the property. It was a suit to try the right to the property, and it was in regard to this right that the plaintiff offered to testify. The statute excluded him as a witness. (See 2 Wagn. Stat., 1372, § 1.)

The verdict being in favor of the defendant, it established his right to the property. The result also determined that the plaintiff was a stranger to the title, and that his pretended claim was fraudulent and void as to the creditors of the defendant in the execution. The constable therefore held the property, not in trust for the plaintiff in any respect, but for the benefit of the plaintiff in the execution. The value of the property assessed in favor of the constable's administrator must go to the payment of the execution, and whatever overplus remains may be seized by other creditors. As the record stands before us, we do not see that the plaintiff is entitled to



the overplus, and the verdict as rendered must stand. (See *Frei vs. Vogel*, 40 Mo., 149; *Dilworth vs. McKelvy*, 30 Mo., 149.)

Judgment affirmed; all the judges concur.

—O—

F. W. KEFFERSTEIN, Assignee of JACOB CORNELI, Respondent,  
*vs.* SAMUEL KNOX, Appellant.

1. *Engineer—Special tax bill—Substitution of name on bill.*—A special tax bill in which the name of the property owner originally inserted by city engineer is stricken out and another added by the assignee instead, is inadmissible in evidence, and this is the case even although in suit on the bill, against the party whose name is substituted, he admits that he owns the property mentioned in the bill.
2. *Engineer—Clerk, certificate, etc.*—It is competent for a city engineer to certify a tax bill upon a measurement made by his clerk. It is sufficient if the officer have official knowledge of the fact.

*Appeal from St. Louis Circuit Court.*

*Jacob Klein*, for Appellant.

I. The decision in the case of *City of St. Louis to use, etc. vs. DeNoue*, (44 Mo., 136,) does not authorize the insertion of a new name by the parties after the tax bill has left the city engineer. Such an alteration destroyed the instrument for legal purposes and rendered it inadmissible as evidence.

II. The tax bill was incompetent as evidence, because the city engineer who signed the bill, had no personal knowledge of the work charged. The description of the work, as contained in the bill, was a mere copy of a memorandum given by the special tax clerk. (2 Phil. Ev., Cow. and Hill's notes, 255.)

*Thomas Grace*, for Respondent.

I. The tax bill was valid, notwithstanding the name of appellant did not appear therein, he having admitted himself to be the owner of the ground described in the tax bill. (*City to use Rotchford vs. De Noue*, 44 Mo., 139; *City to use Creamer vs. Bernondy*, 43 Mo., 554.)

II. The engineer was warranted in certifying the tax bill on the measurement of his assistant. The engineer is to be considered as having charge of all work done under his authority in his department. (City to use *Creamer vs. Oeters*, 36 Mo., 463.)

SHERWOOD J., delivered the opinion of the court.

Action on a special tax bill, instituted in the first instance before a justice of the peace. It appeared in evidence on the trial, that the defendant had a life estate in the property mentioned in the bill sued on; that said bill was made out originally against Theresa Achterman and Jeremia Manual Lessus whose names alone appeared in the bill as the persons to be charged thereby; that the signature of the city engineer to the certificate upon the bill was genuine; that said engineer never made any personal examination of the work specified therein; but made such certificate upon the measurement of his special tax clerk, employed in his office in that capacity; that after the bill was made out, certified and delivered, the plaintiff, of his own motion, and without the knowledge or consent of Bischoff, the city engineer, with lead pencil struck out the names of the lessees and inserted that of the defendant; that this erasure and insertion were made in order that the summons might be issued against the defendant. After these facts were either proven or admitted, plaintiff offered to read the tax bill in evidence, but the defendant insisted that the bill was not competent evidence against him for any purpose, giving specific reasons therefor. The tax bill was however permitted to be read, and was dated January 31st, 1868. E. H. Hesse testified that he was employed by the city engineer as special tax clerk, and in that capacity he had made a measurement of the work referred to, and found that the bill corresponded with his memorandum of such measurement.

This was in substance the testimony and at its close, certain declarations of law, denying plaintiff's right of recovery, were refused, judgment rendered against defendant and his surety (on the appeal bond), with direction that if it were

not satisfied out of the general property of defendant and his surety, that the residue be levied of the property described in the tax bill which was declared to be a lien on such property. The Circuit Court in general term affirmed this judgment and the cause comes here by appeal.

The objections of the defendant were certainly well taken to the admission of the tax bill in evidence. The only reason why a bill of this kind is admissible at all against any one, is owing alone to the force and effect of the statute which gives it such operation. And it would seem to be a proposition too plain for discussion that such a bill could by no possibility be admissible to establish a liability or create a charge against a person not named therein, and who, therefore, was to all intents and purposes, a stranger to the whole transaction. Where a statute makes the certificate of an officer *prima facie* evidence of the right of one man to recover judgment against another, it would appear manifest beyond question, that a reasonable degree of strictness, to say the least of it, should be the governing principle in giving that statute its proper construction; and that no plea of either convenience or expediency ought to enlarge its scope, or extend its sphere of operation outside of the limits originally assigned by the legislative will. The fact that the defendant admitted at the trial that he was the owner of the property mentioned in the tax bill, could not impart to that instrument a legal existence and validity which, prior to such admission, it did not possess. In the case of the city of St. Louis, etc. vs. Bernoudy, (43 Mo., 552,) cited by respondent, the actual point decided was, that it was unnecessary to insert the name of the trustee in a tax bill in addition to that of the *cestui que trust*, as the latter possessed the equitable and beneficial, and the former, but the dry legal estate, and consequently, that he, in contemplation of the statute, was not the owner of the property.

Another case, that of the city of St. Louis, etc. vs. DeNoue, (44 Mo., 137,) is also cited by respondent; but it does not seem that any objection to admitting the tax bill in evidence was made in that case, so that it cannot properly be claimed as authority here. And even did that case go to the full length

respondent claims, it would require more cogent reasons than any likely to be produced, to induce the yielding of assent to what I could but regard as no less than a very grave error.

It was competent for the city engineer to certify the tax bill upon the measurement made by his clerk; this was so ruled in the case of the city of St. Louis, etc. vs. Oeters, (36 Mo., 456). It is impossible, in the very nature of things, that an officer should be able to give his personal supervision to all the various business details of his office. If not allowed to employ assistants and subordinates, and to largely rely upon both their faithfulness and capacity, the public interests would often suffer detriment. It is sufficient, if the officer who makes the certificate has official knowledge of the facts to which he certifies; and such knowledge may well be derived from the above indicated sources. But the certificate of the officer in the case at bar, from whatever source his knowledge was obtained, could, as above seen, have no effect as to the defendant, nor be the basis of any valid procedure against him.

It is unnecessary to criticise the judgment in point of form, as it must be reversed. The other judges concur.

—o—

GEORGE MARKET, Appellant, *vs.* THE CITY OF ST. LOUIS, Respondent.

1. *Damages—Street gutter out of repair—Injuries to team in crossing—Notice to authorities of state of street, etc.*—Where a street gutter was washed away and a mule team which was compelled to cross received damage in consequence, and the evidence showed that the street had been in that condition for two months held, that the city was liable, although not notified that the street was out of repair.

*Appeal from St. Louis Circuit Court.*

*Smith P. Gall*, for Appellant.

*E. P. McCarty*, for Respondent, cited in argument: *Mayer vs. Sheffield*, 4 Wal., 195; *Dillon on Municipal Corporations*, § 790, p. 759-60-61; *Cole vs. Village of Medina*, 27 Barb., 218;

Peck vs. Same, 32 Barb., 134; Hart vs. City of Brooklyn, 36 Barb., 229; Van Dyke vs. Cincinnati, 1 Dis. 737-8; McGinity vs. City of New York, 5 Duer., 674.

NAPTON, Judge, delivered the opinion of the court.

This action was brought to recover the value of a mule alleged to have been injured in driving over Second street, by reason of a ditch on the south side of Cass Avenue, alleged to have been left in an unsafe condition by the negligence of defendant.

There was no question that the ditch was washed out and unfit for crossing, and that plaintiff's wagon in crossing the ditch or gutter, suddenly sank into it so that the pole of the wagon was thrown upon one of the four mules in the team and broke his leg.

There was no question that this gutter had been out of repair for a month or so, before this accident, and that plaintiff knew of the unsafe condition of the crossing. The plaintiff was engaged in hauling coal to a manufacturing establishment, situated on Second street, just south of Cass Avenue. This place was accessible by another route, but it does not appear that the plaintiff was advised of any other way of getting his coal to the place of delivery than the route he took. The city authorities were not advised of the bad condition of this gutter until a day or two before the accident, and repairs were made on the day succeeding.

Upon the evidence the court instructed the jury that the plaintiff was not entitled to recover unless the defendant (the city) was notified of the unsafe condition of said gutter and neglected to repair it in a reasonable time thereafter. Notwithstanding this instruction the jury returned a verdict for plaintiff.

Of course, where a street is out of repair from a casual rainstorm or any other sudden and unforeseen violence, the city cannot be held responsible for accidents occasioned by such sudden occurrences, until the authorities have had a reasonable time to make the necessary repairs. But if a reasonable time has elapsed, as was the case here, where the defect

continued for two months, no express notice is necessary. (Regner vs. The City of Rochester, 45 N. Y., 136.)

That the plaintiff was aware of the unsafe condition of this crossing is no answer to the action, if he was obliged to travel that street in order to deliver the coal. The evidence was that the entrance to Second street from the street south of Cass Avenue was worse than the one attempted to be crossed by the plaintiff; so that the plaintiff was reduced to the necessity of selecting between two bad crossings, and selected the one he considered the best, although his two-horse wagon had been broken there the week before.

It appears that there was an entrance to this manufactory from Main street, of which the plaintiff was ignorant, and it seems that the proprietor of the oil works where the coal was delivered addressed a letter to the city engineer on this subject, which, however, was not attended to until after the injury to plaintiff's mule.

The General Term reversed the judgment at Special Term, doubtless because the verdict was against the instructions. The instruction was very favorable to defendant, more so than the law justified, for we do not think any notice necessary where there has been a standing nuisance in a public street for two months.

The judgment of the General Term is therefore reversed, and the judgment at the Special Term affirmed.

—o—

ANDREW A. LeBEAU, Respondent, vs. JAMES ARMITAGE AND  
THOMAS GAVEN, Appellants.

1. *Land titles—Confirmation under act of Congress, good as against subsequent grant, etc.*—A confirmation of land made in 1811, under the act of Congress of March 3rd, 1807, accompanied with a survey of said confirmation in 1845, and a certificate for patent, is good as against a grant from Congress of the same land made in 1866. At the date of said grant the United States had no title to the land except a bare legal title. The equitable title was in the confirmee; and the legal title under our statute would in such case enure to the owner of the equitable one



*Appeal from St. Louis Circuit Court.*

*T. T. Gantt*, for Appellants.

1st. It appears plainly from the record that the land in controversy was, in 1811, confirmed to the legal representative of Provenchere, who was Calvin Adams.

2nd. That Calvin Adams had been with his family in possession of this land since 1805, and that they and their legal representatives have been in possession of it ever since, the defendant succeeding, by purchase, to their claim and possession in 1858.

3rd. That by the confirmation of 1811, Calvin Adams became, as against the United States, conclusively entitled in equity to this land, which was located by a survey approved in 1845. (*Burgess vs. Gray*, 16 How., 48; *Le Beau vs. Gaven*, 37 Mo., 556.)

4th. That thereafter the United States had only a naked legal title to the land.

5th. That on April 12th, 1866, this legal title was conveyed to Augustin Amiot.

6th. That the statute of uses (Gen'l Statutes of Missouri, Ch., 108, § 1,) immediately executed this use and transferred it to the holder of the equitable estate.

7th. When a conflict arises between the holder of such a legal estate and him who is conclusively entitled to it in equity, and the equitable title is pleaded and shown by the proofs, the courts of Missouri will give effect to the equitable title. (*O'Brien vs. Perry*, 1 Blacks, 138; *Le Beau vs. Armitage*, 47 Mo., 138.)

*Samuel Reber*, for Respondent.

I. The defendants' equity (admitting they have an equity) cannot be set up against the plaintiff's legal title.

Where there are independent Spanish titles or claims to confirmation, the one first confirmed—that is the first to obtain the legal title holds the land. The courts cannot inquire into the comparative equities which existed between the two

titles prior to the issue of the legal title, and award the land to the holder of the junior legal title on the ground of a superior equity; much less then can they award it to the holder of a mere equity. (*Chouteau vs. Eckhart*, 2 How., 344; *Les Bois vs. Bramell* 4 How., 449; *Landes vs. Brant*, 10 How., 370.)

The political department of the government, and not the judicial, decides which claimants are entitled to a grant of the legal title, and confers it upon them.

In point of law the Spanish claimant is wholly at the mercy of the government until he obtains the legal title, for until then he has no vested interest; until then, his claim is addressed to the country, or more properly speaking to the political, and not the legal, justice of the government.

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is the comparative value, in an action of ejectment, of a grant from Congress of the United States, in 1866, and a confirmation of the same land made in 1811, under the act of Congress of March, 3rd, 1807, accompanied with a survey of said confirmation in 1845, and a patent certificate.

By the act of March 2nd, 1805, and the act of February 28th, 1806, the Board of Commissioners were required to report their action on Spanish Claims to Congress or to the Secretary of the Treasury, who was required to report them to Congress. But by the act of 1807, the "decision of the commissioners, when in favor of the claimant, was declared final against the United States, any act of Congress to the contrary notwithstanding."

In the case of *West vs. Cochran*, (17 How., 414;) it was observed by the court (Catron J., delivering the opinion) that the act of March 3rd, 1807, was the first that gave a Board of Commissioners power to adjudicate claims against the United States, and conclude the government as to the question of right in the claimant.

These confirmations however, did not confer a legal title on the confirmer, since the commissioners were required to

transmit to the Secretary of the Treasury and to the surveyor general of the district where the land was, transcripts of their final decision, made in favor of each claimant, and were required to deliver to him a certificate, stating the circumstances of the case and that he was entitled to a patent for the tract therein designated, which certificate was to be filed with the recorder.

Where the land had not been surveyed, the seventh section of the act of 1807 required a survey under the direction of the surveyor general, and a transmission by him of the plat of land so surveyed to the recorder and to the Secretary of the Treasury. Upon the filing of this plat with the recorder, the recorder was required to issue a patent certificate in favor of the claimant, and this being sent to the Secretary of the Treasury, entitled the party to a patent.

In this case, the defendant is the legal representative of one Calvin Adams, who was confirmed in 1811, to a claim of J. B. Provenchere, founded on a grant from the Spanish authorities in 1784. This claim of Adams under Provenchere, was surveyed and the survey approved in June, 1845, and a patent certificate issued, but no patent.

The defendant and those under whom he claims have been in possession of the land since 1805.

In 1866, by an act of Congress, this land was granted to the legal representatives of Amiot, and the plaintiff is the legal representative of this grantee.

It is obvious that at the date of this grant by Congress, the United States had no title to this land, except a bare legal title, since the confirmation by her agents in 1811 had determined the right to be in the representatives of Provenchere, fifty-five years before the passage of the act. In such case had a patent issued to any other than the representatives of Provenchere, it would have been disregarded by the courts as issued contrary to law. (*O'Brien vs. Perry*, 1 Black., 138; *Smith vs. Stephenson*, 7 Mo., 610; *Polk's Lessee vs. Wendall*, 9 Cranch, 87; *Carrol vs. Safford*, 3 How., 441.)

The only question in the case is, whether a conveyance of the legal title of the United States by an act of Congress has

a superior efficacy to a patent, in a case where the United States was as completely divested of the equitable title as in the cases above referred to, where the patent was pronounced null and void. The United States, like any other landed proprietor, can only give away such title as the United States has. If a complete title has been once granted to A. a subsequent grant of the same title to B. is a mere nullity. Patents which convey the legal title, can only be issued in conformity to law, and the legislative department of the government provides how and under what circumstances they may be issued. If the officers intrusted with their issuance make grants without authority they are mere nullities. A direct grant by Congress undoubtedly occupies a different position, since the legislative department may disregard previous regulations and pass the title of the government in defiance of rules prescribed to the executive departments. But neither the legislature of the United States nor the executive can do more than pass the title of the United States. If that title has once vested in A. they cannot confer it on B.

Previous to the confirmation of 1811, there was no title which the courts could recognize. There was a mere political obligation on the government to carry out the imperfect grants of its predecessor, but this political obligation was enforced when the Board of Commissioners reported favorably on Provenchere's claim, and thereby concluded the government as to the right to the land confirmed. There was then a complete equitable title in the legal representatives of Provenchere. Could this equitable title be disregarded, after the lapse of fifty years, and be transferred to another by the arbitrary decree of any department of the government? Certainly not. Congress could transfer the naked legal title, for that was still in the United States, but it could confer nothing more than that.

And this naked legal title, if not transferred, by our statute inures to the owner of the equity, and would, under our practice in ejectment, be an effectual bar to a recovery. The equitable title was specially pleaded, and it is no inter-

ference with the primary disposal of the soil for our State Courts to determine that the shadow shall follow the substance; that the naked legal title shall inure to the owner of the equitable title in possession.

We think, therefore, that the court erred in declaring the plaintiffs title such an one as entitled him to a recovery, without regard to the merits of the equitable title set up in defense, and therefore reverse the judgment and remand the case. The other judges concur.

— 0 —

PETER SIEMERS, Defendant in Error, vs. GEORGE KLEEBURG  
AND EMLINE KLEEBURG, Plaintiffs in Error.

1. *Husband and wife—Wife may answer separately, when.*—Under the statute (Wagn. Stat., 1001, § 8) a married woman may answer separately although her husband be co-defendant.
2. *Married woman—Mortgage on separate property—Acknowledgment—Relinquishment of dower, etc.*—The certificate of acknowledgment of a married woman to a mortgage given by her on her separate property, is not void by reason of the fact that she is therein made to relinquish her dower. Such clause may be rejected as surplusage.
3. *Married woman—Acknowledgment by in 1859 before notary.*—It was competent in the year 1859, for a notary public to take the acknowledgment of a married woman to a conveyance of her real estate. *Mitchell vs. People*, 46 Mo., 203, affirmed.)
4. *Feme covert—Mortgage of separate estate—Acknowledgment—Unnecessary when.*—*Seem*, that a *feme covert* signs a promissory note, her separate estate will be bound, although her deed of trust given upon such estate to secure the note was unacknowledged.
5. *Married woman—Contract—Consideration.*—The contract of a *feme covert* in order to bind her separate estate need not be based upon a consideration moving directly to her.
6. *Married woman—Mortgage by charge upon rents, etc., when—Trustee should be party, when.*—A mortgage by a married woman upon property held by her in trust will be construed in equity as a charge upon the rents and profits arising therefrom in the hands of the trustee. And in suit to foreclose such mortgage, and for general relief, the trustee should be joined as a party.

*Error to St. Louis Circuit Court.*

*Slayback & Häusler*, for Plaintiff in Error.

I. This is an action at law, and defendant Emeline's separate estate can only be reached by equity. (See *Riley vs. McCord*, 24 Mo., 265; 4 Kent's Com., 192-5; *Higgins vs. Peltzer*, 49 Mo., 156; *Bauer vs. Bauer*, 40 Mo., 62.)

II. Defendant, Emeline, upon the facts shown, did nothing to charge her separate estate, as the same was not derived from her husband. (*Kinner vs. Walsh*, 44 Mo., 65.) In *Lincoln vs. Rowe*, (51 Mo., 571) the *feme covert* signed the note, thereby making the debt her own.

III. The acknowledgment of the mortgage by Mrs. Klesburg was so defective that equity could not cure it. (*Wagn. Stat.*, 935, § 14; *Raymond vs. Holden*, 2 Cush., 264, 271; *Bruce vs. Wood*, 1 Mete., 542-3.)

IV. Being acknowledged before a justice of the peace, it could not affect the wife's estate (7 Mo., 316). The mode of acknowledgment by married women at date of the certificate was governed by the statute of 1855 (R. C. 1855, Ch. 32, § 35). This was the law up to February, 1864 (Adj. Sess. Acts 1863-4, p. 27). The last named act attempts to retroact, but it cannot cure a deed which was inoperative and void *ab initio*. (*Potter's Dwar. Stat.*, 164-5.)

*Eber Peacock*, for Defendants in Error.

I. A married woman can charge her separate estate for her own debt; and if so, why not secure the debt of her husband? (*Whitesides vs. Cannon*, 23 Mo., 547; *Claffin vs. Van Wagoner*, 32 Mo., 252; *Kim vs. Weippert*, 46 Mo., 532; *Schnaider vs. Staihr*, 20 Mo., 271; *Miller vs. Brown*, 47 Mo., 504; 51 Mo., 571.)

II. The words "relinquishes her dower" in the acknowledgment to the mortgage are merely surplusage. (*De Lassus vs. Poston*; 19 Mo., 432.) But we hold the deed would be good without any acknowledgment whatever as between the parties to this action. (*Claffin vs. Van Wagoner*, 32 Mo., 254.)

III. The trustee could not consistently be a party to this action, for if the purpose in joining him be to call in and pass the fee as well as the equity, in case of sale, as there is in the



deed of trust a remainder in trust outstanding, the effect of such action would be to destroy the remainder ; otherwise the action would be void.

IV. As to the point that the action is at law, and therefore void as to the wife, it is only necessary to refer the court to the record to see that the whole proceeding is in its nature a proceeding to foreclose an equitable mortgage.

V. A married woman cannot sue or defend without being in court with the husband, except where the two are opposed to each other. (Wagn. Stat., 1001, § 8.)

SHERWOOD, Judge, delivered the opinion of the court.

In 1857, a certain tract of land situated in the county of St. Louis, was conveyed by Joseph Thibault and wife, to Frederick C. Kleeburg "In trust for the following purposes: First, to receive and collect the rents, issues and profits of said property hereby conveyed, and after defraying the costs of repairs upon the same, and taxes and necessary expenses of said property, to pay the said rents, issues and profits to the said party of the third part (Emeline B. Kleeburg) for and during her natural life, upon the receipt of the third party and upon her receipt alone, without any control or interference from the said George Kleeburg, husband of said party of the third part. Second, to hold said property for the use and benefit of such of the children of the said Emeline B. Kleeburg as may be living at the time of her death, and to convey the same in fee simple to such of them as may survive the said Emeline B. Kleeburg and attain the age of twenty-one years," &c., &c.

On June the first, 1859, George Kleeburg executed and delivered to Frederick Grube his promissory note for \$500.00, payable in twelve months, with interest at ten per cent. ; and on the fourth of the same month Kleeburg and wife executed and delivered to Grube, a mortgage, purporting to convey the property mentioned in the deed, made to the trustee to secure the payment of said note.

In this mortgage, both the husband and wife joined as grantors, and it and the acknowledgment are in the form usu-

ally employed where a married woman designs to convey real estate held in her own right, except that to the certificate of acknowledgment are added the words, "and relinquishes her dower in the real estate therein mentioned."

Suit was afterwards brought by Peter Siemers, the present plaintiff, who claims to be the purchaser of the note from Grube, against George Kleeburg, his wife, Emeline, and the trustee, Frederick Kleeburg, to foreclose the foregoing mortgage.

The petition in substance states, that Emeline Kleeburg being seized and possessed of certain land, describing that mentioned in the mortgage, executed with her husband a mortgage on that land as security for the payment of the note held by Grube; that the land so mortgaged had been conveyed to the separate use of Mrs. Kleeburg; that the note before maturity was, together with the mortgage, assigned and delivered by Grube to plaintiff; that the note was unpaid, and judgment was asked for the principal and interest of the note, "that the equity of redemption of said mortgage be foreclosed and said land sold to pay said judgment, and for such other and further relief as is demanded in the premises." The husband and wife filed separate answers. The plaintiff dismissed as to the trustee, and the court rendered judgment for the recovery of the amount of the note and interest yet remaining unpaid, and that the equity of redemption of George Kleeburg and Emeline Kleeburg be foreclosed, and that the mortgaged premises be sold to satisfy the amount decreed to be due and charged on the mortgaged property. It was competent for Kleeburg and his wife to answer separately. Section 8, p. 1001, 2 Wagn. Stat., provides \* \* \*

\* "In all actions by husband and wife, or against husband and wife, they may prosecute the same by attorney, or they, or either, may defend by attorney," &c., &c.

The objection to the form of the certificate of acknowledgment of the mortgage is not well taken. The additional words employed therein may be rejected as surplusage. (*Chauvin vs. Wagner*, 18 Mo., 531; *De Lassus vs. Poston*, 19 Mo., 425.)

The other objection, that at the time the acknowledgment was taken, (June 4, 1859,) a notary public had no authority to take the acknowledgment of a married woman to a deed conveying her own estate, is also untenable. The decision of *West vs. Best* (28 Mo., 551) which upholds the doctrine contended for by plaintiffs in error, was subsequently and very properly overruled in *Mitchell vs. People* (46 Mo., 203). In consequence of the decision last mentioned, an examination into the force and effect or validity of the act of February 15, 1864, so far as that act has relation to a certain class of acknowledgments, taken prior to that enactment, becomes unnecessary. If, however, the mortgage had not been acknowledged at all, it would seem that the simple lack of acknowledgment would not, of itself, render that instrument null. For, as it has been repeatedly held in this State that the signing of a promissory note by a *feme covert* owner would bind her separate estate, the same result would logically follow the execution of an instrument purporting to create an incumbrance on such separate property. But this point not being directly involved in the record, the expression of any decided opinion on it need not be given.

The position of counsel for plaintiffs in error, that the contract of a *feme covert*, in order to bind her separate estate, must be based on a consideration moving directly to her, is obviously incorrect. The right of a married woman to dispose of property settled to her sole use, either for her own benefit or for the benefit of another, as security or otherwise, is a necessary corollary from the premise that *quoad* such property she is a *feme sole* (*Lincoln vs. Rowe*, 51 Mo., 571). In the absence of any clause in the instrument creating the trust against anticipation or alienation, she will be in respect to her separate estate, held by a court of equity, as free to act, as untrammelled, as any other property owner whatsoever.

It will be observed in the present instance, that the interest of Mrs. Kleeburg is simply an equitable one. She is only entitled during her life to the usufruct of the property conveyed to the trustee; and even then the enjoyment of the rents

and profits is, by the very terms of the trust, made to depend upon the execution to him of her individual receipt. Whether the mortgage executed by Mrs. Kleeburg upon the trust property would amount in equity to a charge upon the rents and profits arising therefrom in the hands of the trustee, is a point by no means free from difficulty; a difficulty which an examination of the numerous and conflicting authorities by no means tends to dispel. I am, however, of the opinion, that the only legitimate conclusion deducible from the execution of the mortgage by Mrs. Kleeburg is, that she intended such a charge should be created, for otherwise her act would be meaningless and inoperative. (*Lincoln vs. Rowe supra*, and cases cited.)

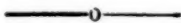
I was at first inclined to regard the proceeding in the court below as merely a suit at law to obtain a statutory foreclosure; but after a careful scrutiny of the petition, and a *piecing together* of its *disjecta membra*, I was able at length to discover, that the pleaders ought to subject the separate estate of Mrs. Kleeburg to the payment of the mortgage debt; for the petition as a whole, in effect, alleges, that Mrs. Kleeburg, being seized and possessed of a separate estate, mortgaged the same, in order to secure the debt due by her husband. And although the petition asks that the equity of redemption be foreclosed, yet it concludes with what an old chancellor has denominated the next best prayer to the Lord's Prayer—a prayer for general relief.

But an objection more serious than any yet considered, results from the dismissal of the trustee before the cause was heard. In ordinary suits under the provisions of our Practice Act, the non-joinder of a party, if not objected to, either by demurrer or answer, is deemed to be waived. This being, however, a proceeding in equity, must be governed by equitable principles and rules. Judge Story on this point remarks: "It is the great object of courts of equity to put an end to litigation, and to settle if possible, in a single suit, the rights of all parties interested or affected by the subject matter in controversy. Hence the general rule in equity is, that all persons are to be made parties who are either legally or

equitably interested in the subject matter and result of the suit, however numerous they may be, if they are within the jurisdiction, and it is, in a general sense, practicable so to do." (§ 1526, 2 Sto. Eq. Jur.) The same learned judge, in his treatise on Pleading, holds, that in suits respecting the trust property, trustees, as well as *cestuis que trust*, are *necessary* parties. (Sto. Eq. Pl., §§ 201, 207, 209, 236.)

As this case stands at present, had there been a sale under the decree, what would the purchaser have obtained? Not a title, either legal or equitable, to the rents and profits of the trust property, but at best only a mere *barren right* to proceed in equity against both the trustee and the *cestui que trust*, to be subrogated to the rights of the latter, in respect of those rents and profits. This would be the *apparent effect* of allowing such a glaring dereliction from the proper rules of equitable procedure to pass unnoticed and go unrebuked. But it is impossible to foresee what embarrassing complications might arise, or what ruinous sacrifices might befall the trust property, if the decree as rendered was allowed to stand.

In order that the plaintiff may suitably amend his petition, and make the trustee a party, and in order that if, upon a hearing anew, a decree should again go in favor of the plaintiffs, such decree may be so moulded as to require the trustee to pay over and deliver to the purchaser or purchasers at the sale under the decree, the rents and profits arising from the trust property, during the life of Mrs. Kleeburg, the judgment will be reversed and the cause remanded. All the judges concur.



MARY HUTH Appellant, *vs.* CARONDELET MARINE RAILWAY  
& DOCK COMPANY, Respondent.

1. *Land titles*—*Title bought by vendee to defeat vendor*.—It is the settled law of this State that a vendee may buy up a title antagonistic to that of his vendor, and set up the title so bought to defeat that of his vendor.

---

Huth v. Carondelet Marine Rly. & Dock Co.

---

2. *Conveyances—Cotemporaneous declarations.*—The declarations of parties made at the time of executing a deed and showing the intention of the parties in making it, may be competent, where the testimony does not involve the construction of the instrument.
3. *Infant—Conveyance by—Acquiescence in after majority—How long necessary to work affirmance of deed.*—Where one who has made a conveyance during infancy, after becoming of age, does some act which is totally inconsistent with an intention to disaffirm, as receiving rent on a lease made in his infancy, after he becomes of age, an affirmance may be inferred from such act without regard to the lapse of time which has intervened after majority. But mere silence or inaction will not have the effect of a disaffirmance unless continued so long after attaining majority as to work a bar under the statute of limitations.

*Appeal from St. Louis Circuit Court.*

*Bakewell & Farish*, for Appellant.

I. It was too late to disaffirm more than three years after majority. The disaffirmance must take place within a reasonable time. (*Doe vs. Smith*, 3 T. R., 436; 3 Bac. Abr., 145; 3 Burr., 1719; *Richardson vs. Bright*, 9 Ver., 368; *Bigelow vs. Hening*, 3 Ver., 353; *Wallace vs. Lewis*, 4 Harr. Mich., 75; *Hastings vs. Dollarhide*, 24 Cal., 245; *Jenkins vs. Jenkins*, 12 Iowa, 198; *Blenkensop vs. Stont*, 25 Ill., 132.)

II. The voidable contract of an infant will be ratified by tacit consent. (*Law vs. Lovejoy*, 8 Me., 405; *Kline vs. Beebe*, 6 Conn., 506; *Robinson vs. Weeks*, Am. Law Reg., 1869, p. 554; *Scott vs. Buchanan*, 11 Humph., 468; *Kent's Com.*, 238, note; *Sto. Cont.*, 572-4, Ed. 1847.)

*S. N. Holliday*, for Respondent.

*T. T. Gantt*, for Respondent, cited in argument: *Peterson vs. Laik*, 24 Mo., 541; *Youse vs. Norcum*, 12 Mo., 549.

NAPTON, Judge, delivered the opinion of the court.

This suit is to recover dower in a leasehold of 14.99-100 acres.

Charles Huth, the husband of plaintiff, died in 1850, having in possession and claiming title to a leasehold for 99 years from the inhabitants of Carondelet, granted to one Chartrand in 1843, and held by said Huth, through convey-



ances from Chartrand. This title was sold by Huth's administrator to the persons under whom defendant claims. The defendant, however, to defeat the claim of dower, set up a title adverse to Huth's, and insists that Huth had no title at his death, and that the deed from his administrator conveyed none,—and therefore that his widow had no dower. This adverse title is based on a deed from Chartrand to Withnell, made on the 15th day of May, 1851, and a deed from Burbayge to Withnell, dated June 19th, 1851, and Withnell's conveyance to the persons who obtained the Huth title from his administrator.

Burbayge, it seems, had a lease dated in 1840, prior to that granted to Chartrand—a lease however, containing the same conditions and reservations which the lease to Chartrand did. The rent reserved was the same, and the forfeiture of the lease depended on the failure to pay this rent within six months after it became due. This lease was conveyed by Burbayge on June 19, 1851.

It is admitted that Chartrand was under age when he made his deed to the persons who sold and conveyed to Huth; that he was only 18 years old, and that it was about three and one-half years after he became of age, that he executed the quit-claim deed to Withnell. Huth having died in 1850, in possession of the leasehold, his administrator, Fremon, advertised it for sale in accordance with orders from the Probate Court. Darby, Erskine and Carlin proposed to buy it. Whether they offered \$2,500 for it on the day of the public sale, or not, is a disputed fact; but it seems that before the sale was consummated, an examination of the title was made by Darby, one of the three who proposed to buy, who was a lawyer, and objections were made to the title on two grounds; one, that Chartrand was under age when he made his deed to the grantor, Huth, and the other, that there was an outstanding lease to Burbayge. To obviate these objections and render the title proposed to be sold unobjectionable, it seems to have been agreed that these two titles should be bought up. It was therefore arranged between the administrator and Darby, Erskine and Carlin, that the administrator

should report these objections to the Probate Court, and ask for an order allowing him to sell privately; and it was also agreed that John Withnell, who was a neighbor, friend and creditor of Huth, would be the most suitable person to negotiate these purchases with Chartrand and Burbayge.

It appears that Withnell's intervention was successful; that he represented himself as acting in the interest of Huth's estate, and that for \$600, which he advanced, he obtained the deed from Chartrand heretofore referred to. How the deed to Withnell from Burbayge was procured is not established, but it was procured for \$100, paid by Withnell, according to the recitals in the deed. The purchase money of both these deeds, though advanced by Withnell, was ultimately paid by Darby, Erskine and Carlin, so that they paid \$3,200, for the lease.

Upon the trial the court declared the law to be, first; that if, prior to the deed to Chartrand in October, 1843, there was a deed in 1840 to Isaac B. Burbayge, it was a bar to plaintiff; and second, that if Chartrand was born in 1836, and in the Spring of 1851, Erskine, Darby and Carlin employed John Withnell to purchase for them the title of Chartrand to block 66, of the Common of Carondelet, and furnished the said Withnell with the money to make the purchase, and Withnell as the agent of said Darby, Erskine and Carlin, purchased said title and took a deed to himself, dated May 15, 1851, and said Withnell afterwards in June, 1851, executed to Darby, Erskine and Carlin the deed of that date read in evidence, the plaintiff cannot recover.

The court found for defendant, and the judgment was in conformity to this view.

The first declaration of law by the court was that a lease dated three years before the one to Chartrand was a bar to plaintiff's recovery. The defendants held under Chartrand. These leases from Carondelet were made upon condition of payment of rent, and they were liable to forfeiture upon non-payment of rent within a specified time. The mere execution of a lease dated in 1840, without any proof of its acceptance, or of any payment of rent during the ten years that

elapsed from its execution to the conveyance by Burbayge, was hardly sufficient to sustain this prior lease as a bar. The first instruction or declaration of law was therefore wrong.

The second declaration of law is based on the assumption that the administrator of Huth had no agency whatever in procuring the second deed from Chartrand, and that the intention of the grantor was of no importance; and that the deed of May 15, 1851, was made to a stranger to the Huth title.

The question whether this last deed of Chartrand was made to a stranger to the Huth title, or whether it was made in confirmation of his prior deed, is a question of fact, not depending altogether on the construction of the deeds, which is a question of law, but upon facts outside of the deeds. The assumption that the second deed of Chartrand was made to a stranger is totally unwarranted, for there was certainly abundance of proof that Withnell, to whom the deed was made, acted as agent of Huth's estate and was a decided friend of Huth and a client of his administrator and a creditor of the estate who had an interest in the consummation of the sale. This question was totally ignored in the instruction; and whether this second deed of Chartrand was intended as a ratification of his first deed, or not, is a matter of fact, not to be decided as a matter of law, because his second deed was to a different person.

The second instruction is based on the assumption that Chartrand's deed to Withnell, made in 1851, was to one who repudiated the title from Huth, and who claimed adversely to his estate. There is no doubt that a vendee may buy up a title antagonistic to that of his vendor, and set up the title so bought to defeat that of his vendor or of his vendor's representatives. This is agreed to be the settled law in this State. (*Macklot vs. Dubrenil*, 9 Mo., 477.)

But this position does not determine the merits of this case—since the main question in it is, whether the vendee purchased or procured an antagonistic title. That the title procured through the intervention of Withnell was not subsequent to the date of the one obtained from Huth's administra-

tor, sufficiently appears from the dates of the deeds. The administrator's sale was advertised in March, 1851. No sale was effected, but it was understood that Darby, Erskine and Carlin would give \$2,500 for the land, and would give six or seven hundred dollars more if a clear title could be obtained. The ultimate sale and deed to Darby, Carlin and Erskine bears date on June 18, 1851. The deed of Chartrand to Withnell is dated in May, 1851, and Burbayge's deed to Withnell is dated June 19, 1851. The deed from Withnell to Darby, Erskine and Carlin is dated June 19, 1851, and it recites that the parties of the first part (Withnell and wife) "in consideration of the sum of seven hundred dollars to them in hand paid by the said parties of the second part, and *also in consideration that* the said parties of the second part have already paid to the estate of Charles Huth; deceased, the sum of twenty-five hundred dollars, for which sum they hold the receipt of the administrator of said estate, they grant, bargain and sell," &c.

This deed alone is certainly very strong proof, if not conclusive evidence, that Withnell's intervention was materially induced by a disposition to advance the interests of the estate. The dates of all these deeds show a co-operation between the purchasers and the administrator to perfect the title of Huth. But the second instruction or declaration of law given by the court ignores all participation of Fremon, Huth's administrator, in procuring these titles, and this would be a very material fact in determining whether the second deed made by Chartrand was in disaffirmance of his first conveyance, or in support of it, and Chartrand's declarations at the time of the deed to Withnell, and Withnell's declarations to Chartrand would also be legitimate proof to determine the intention of the two parties.

There is no doubt, that the construction of deeds is a question of law for the decision of a court—but the deed from Chartrand to Withnell required no construction. It was an ordinary quit-claim deed—but the purpose for which it was made, whether to one who was a stranger to Huth's title, or to one who was representing it and seeking to strengthen it,

is a question of fact, depending on proof of the intention of the parties to it.

Whether Chartrand had a right, under the circumstances, to disaffirm his sale made seven years before, is a question which has been discussed in this case, but is unnecessary to its determination. I do not find on an examination of the cases decided by this court, that this question in regard to the length of time allowed an infant to disaffirm his deed or contract, made in infancy, has ever been judicially determined. It was said by the learned judge who delivered the opinion of the court in *Peterson vs. Laik* (24 Mo., 544), that "the acquiescence of the infant after reaching his full age, for a period short of that which would secure a title by the statute of limitations does not destroy or take away the right which the law, for wise purposes, has conferred on infants of disaffirming their deeds." In that case, the disaffirmance occurred immediately after the parties arrived at full age, and therefore the remark was outside of the case. But as that learned judge rarely made observations which had not been duly considered, I think it must be taken in connection with what immediately follows, which was this: "Whether an infant may not, after attaining full age, within a shorter time, by his declarations, acts or conduct, restrain himself from a disaffirmance of his acts done during infancy, is a question not presented by anything contained in this record."

I infer from this, that in the opinion of Judge Scott, there might be conduct on the part of the infant after his arrival at full age, which, in the circumstances of the case, would preclude him from disaffirming within the period fixed by the statute of limitations.

In the case of *Clamorgan vs. Lane* (9 Mo., 472), all the acts of confirmation or disaffirmance occurred within a few days after the arrival of the grantor at full age. The point of a considerable lapse of time occurring did not arise and was not considered.

In the case of *Yonse vs. Norem* (12 Mo., 550,) the question of time was a leading one—but the grantor was not only an infant, but a married woman at the time of the first deed,

and the fact of coverture during all the time intervening between the first and second deed, was the prominent one on which the decision was based.

In *Ferguson vs. Bell's Adm'r* (17 Mo., 348) the court held, that any act of the infant grantor, showing an acquiescence after becoming of age, would be sufficient, such as receiving part of the consideration money and expressions of satisfaction with the contract.

The subsequent cases of *Leitensdorfer vs. Hampstead* (18 Mo., 270), *Noreum vs. Gaty* (19 Mo., 65), *Noreum vs. Shehan* (21 Mo., 25), *Kerr vs. Bell* (44 Mo., 125), *Highley vs. Barron* (49 Mo., 103), and *Baker vs. Kennett* (54 Mo., 82), do not turn upon this question of mere lapse of time.

There is no doubt, that a conveyance by an infant passes the title, subject to a right on the part of the infant when reaching full age, to disaffirm this contract and convey to some third person. What length of time will be allowed the infant after attaining majority, to disaffirm, is a question which has never been passed upon by this court, so far as my examination has extended. There are loose *dicta* in text books, and perhaps a decision or more of respectable courts, that this disaffirmance must be made in a reasonable time, and that mere acquiescence beyond this reasonable period is equal to an affirmance. That is a very indefinite expression, and amounts to very little more, than that the acquiescence of the adult, laboring under no disabilities, must be attended with such acts as to amount to a virtual recognition of the validity of his deed.

I incline to think, that Judge Scott's observation in *Peter-son vs. Laik* laid down the only practicable rule on the subject. That was, that, in general, the statute of limitations would be the guide—but that in cases where an infant does something totally inconsistent with an intention to disaffirm, as in receiving rent on a lease made in his infancy, after he becomes of age, an affirmance may be inferred.

I do not find any authority for the doctrine, that mere silence or inaction, unless continued so long as to effect a bar



under the statute of limitations, will prevent the infant from disaffirming.

In *Jackson vs. Carpenter* (11 Johns., 541) Judge Yeates makes an observation very much to the same effect as that of Judge Scott in *Peterson vs. Laik*. "I am inclined to think (he says) that the deed given by the infant may be avoided in various ways, at any time, unless barred by the statute of limitations."

The fact, that an acquiescence for years operates as a fraud upon the grantee, is no objection in law to such exercise of his right. The rule is made to protect the infant, and all disaffirmances necessarily, or at least generally, operate to some extent very prejudicially to the interests of the grantee, and may, so far, be regarded as a fraud upon his rights.

In the case above cited—*Jackson vs. Carpenter*—the court says: "No *act* of the infant appears since he arrived at full age, by which his assent could be inferred, except mere omission. He has possessed no property, nor has he received rent. The confirmation of this sale consequently can in no point of view turn out to his advantage, nor can his neglect to do anything from 1784 to 1796 destroy the title. It would be contrary to the benign principles of the law by which the imbecility and indiscretion of infants are protected from injury to their property, that a mere acquiescence without any intermediate or continued benefit, showing his assent, should operate as an extinguishment of his title."

The doctrine of this court, in *Lane vs. Clamorgan* and *Peterson vs. Laik*, that mere acquiescence will not operate as a confirmation, seems to be well supported by reason and authority. But on the view we take of the deed to Withnell, the question is not material.

The judgment is reversed and the cause remanded. The other judges concur.

---

Thomas v. Pullis, et al.

---

JAMES P. THOMAS, Trustee of ANTOINETTE THOMAS, *et al.*,  
Plaintiff in Error, *vs.* JOHN PULLIS, *et al.*, Defendants in  
Error.

1. *Constitution—Title of infant—Power of legislature to pass.*—The legislature has power to authorize a guardian or administrator, or any one else named in the act, to pass the title of an infant, or to compromise an unsettled claim upon such terms as the parties may agree upon.
2. *Estoppel—Improvements upon land, etc.*—A deed of land, although containing a false description of the property, when taken in connection with the fact that for fifteen years after its execution, the grantor lived in sight of the premises and saw valuable improvements erected thereon, was held sufficient to work an estoppel as against the grantor.
3. *Infancy—Ratification of deed after majority—Acquiescence.*—The mere inaction of an infant after coming of age will not constitute a confirmation of a deed made by him during infancy. (*Huth vs. Carondelet & Marine R'way Co.*, ante, p. 202.)

*Error to St. Louis Circuit Court.*

*Glover & Shepley*, for Plaintiff in Error.

I. The acts of the legislature affecting the property in controversy were void as conferring arbitrary power over the property of the infant, Antoinette Rutgers. Her property was free from legislative touch except for her protection and use. (*Rice vs. Parkman*, 16 Mass., 326; *Kibby vs. Chitwood*, 4 Mon., 71; *Stewart vs. Griffith*, 33 Mo., 23; *Carroll vs. Olmstead*, 16 Ohio, 261; *Cochran vs. Van Surley*, 20 Wend., 365, 373; *Leggett vs. Hunter*, 19 N. Y., 445; *Cool. Const. Lin.*, 103; *Fullerton vs. McArthur*, Grants. Cas., 232; *Estep vs. Hutchman*, 14 Serg. & R., 438; *Gannett vs. Leonard*, 47 Mo., 205.)

When a law is enacted for handling the property of infants, and shows that it was made for the benefit of the owner, it must be treated as made in the performance of lawful governmental duty and power. But if a law is passed that takes A.'s property from him and gives it to B. in express terms; or takes from A. his property, not for his benefit; or takes it from A. and places it beyond his reach, and provides him no security and no remedy; or converts his fee simple abso-

---

 Thomas v. Pullis, et al.
 

---

lute estate into a contingent remainder, such a law is not made in the exercise of governmental authority or duty, and is void. (See *Norman vs. Herst*, 5 W., 173; *Jackson vs. Lyon*, 9 Cow., 664; *Bloodgood vs. M. & H. R. R. Co.*, 18 Wend., 9.) When property is divested there must be compensation or some sure and adequate remedy to procure it. (*Rockwell vs. Nearing*, 35 N. Y., 202; *Powers vs. Bergen*, 6 N. Y., 358.)

If it be unconstitutional to seize upon the property by force, not less flagrant is the injustice of pretending to exercise the constitutional power of converting the property of an infant and using it for his benefit, by an act of legislation which virtually deprives him of his property without reference to compensation.

II. The legislature had no power to authorize Pelagie Rutgers to compromise the pending suit. (*Taylor vs. Porter*, 4 Hill., 140; *King vs. Dedham, etc.*, 15 Mass., 447; *Bebee vs. The State*, 6 Ind., 515; *Taylor vs. Place*, 4 R. I., 336; *Bowman vs. Middleton*, 1 Bay, 252.)

*Cline, Jamison & Day*, for Defendants in Error.

I. The act of the legislature of Missouri authorizing certain minors, by their parents and guardians, to execute quit-claim deeds, approved February 11, 1847, Acts of 1847, p. 307, and the act amendatory thereto, approved February 27, 1851, Acts of 1851, p. 616, are not void or unconstitutional. (*Stewart vs. Griffith*, 33 Mo., 13; *Gannett vs. Leonard*, 47 Mo., 205; *Highley vs. Barron*, 49 Mo., 103; *Davidson vs. Jahannot*, 6 Metc., 388; *Rice vs. Parkman*, 16 Mass., 326; *Sobiet vs. Massachusetts's General Hospital*, 3 Cush., 483; *Clark vs. Van Surley*, 15 Wend., 436; *Cochran vs. Van Surley*, 20 Wend., 365; *Estep vs. Hutchman*, 14 Serg. & R., 435; *Wilkinson vs. Leland*, 2 Pet., 627; *Watkins vs. Holman*, 16 Pet., 25; *Leggett vs. Hunter*, 19 N. Y., 445.)

II. Said Antoinette ratified and affirmed said deeds of compromise after she became of age and before she married \* \* \* by living in the vicinity, seeing and knowing of the erection of valuable improvements on said lot in dispute, by the defendants,

and not notifying or informing them of her claim to said lots. (Highley vs. Barron, 49 Mo., 103; Wheaton vs. East, 5 Yerg., 41; Wallace vs. Lewis, 4 Harrington, 75; McNees vs. Swaney, 50 Mo., 392.)

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment, in which the value of the titles confessedly depended on two points; one involving the validity of certain acts of the legislature of Missouri, and the second—assuming their invalidity—whether there were in evidence facts sufficient to show a ratification of the supposed invalid acts, after the plaintiff became of age. The title of the plaintiff was based on a conveyance from Isabella Mackay, the widow of James Mackay, and the defendant's title came from the same source. There was a dispute in 1847, as to the right of Isabella Mackay to convey the land, and the children of James Mackay conveyed to one Rannells their title, and this controversy was unsettled when the acts of the legislature referred to were passed. There was also a claim on the part of the heirs of Arend Rutgers when the first act was passed. The act of 1847 is entitled: "An act to authorize certain minors, by their parents and guardians, to execute quit-claim deeds," and the body of the act is as follows: "Whereas, George Magwire, Marie Amelia, his wife, Ferdinand Saugrain and Eliza Dina, his wife, Ferdinand Provenchere, Anthony S. Robinson and Mary Frances Robinson, infant daughter and sole child of said Anthony S. Robinson and Sarah Eulalie, (late wife of Anthony S.), heirs and legal representatives of Arend Rutgers deceased, parties of the first part, Charles S. Rannells party of the second part, and Louis Rutgers and Pelagie, his wife, and Antoinette, infant daughter and sole child of said Louis and Pelagie Rutgers, of the third part, claim to hold conflicting titles to a certain tract of land, in the southern part of the City of St. Louis, in the State of Missouri, containing thirty-three arpents, more or less, which tract of land was bounded in the year 1825, (here the boundaries are given) being the same tract for which Isabella Mackay, widow of

---

Thomas v. Pullis, et al.

---

James Mackey, made a deed to said Arend Rutgers; and whereas the parties of the first, second and third parts, for the purpose of compromising and settling said conflicting claims, have agreed to divide the said tract of land between said three parties according to terms equitable and just to all, and to give to each other a quit-claim deed for the portions allotted to each of said three parties, by the terms of said compromise, the parents and guardians of said minors acting for them; now therefore,

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. The said Anthony S. Robinson, father and guardian of said Mary Frances Robinson, is hereby authorized and empowered to execute and deliver to the said parties of the second and third parts, a quit-claim deed of the interest of said Mary Frances Robinson, in and to the portions of said land, allotted by said compromise to said parties of the second and third parts, and that the said Louis Rutgers, father of said Antoinette, (infant daughter and only child of said Pelagie and Louis Rutgers,) and Louis Clamorgan, next friend of said Antoinette, be, and they are hereby authorized and empowered, to execute and deliver to said parties of the first and second part, a quit-claim deed of all the interest of said Antoinette, (only child of said Louis and Pelagie Rutgers,) in and to said portions of said tract of land, allotted by the terms of said compromise to said parties of the first and second parts.

2. The conveyances to be made under the first section of this law, shall be submitted to the Probate Court of St. Louis county, for its consideration and approval.

The act of February 17, 1851, is as follows: It is entitled "An act to amend an act entitled an act," etc., approved February 11, 1847.

Section 1. That Pelagie Rutgers, mother of said Antoinette Rutgers, named in the act to which this is an amendment, and Louis Clamorgan, her next friend, are hereby authorized to make any arrangement of compromise, with any and all

---

Thomas v. Pullis, et al.

---

parties claiming title to the property described in the preamble of said act, and are hereby empowered to make, execute and deliver quit-claim deeds to any or all such parties, which said deeds shall operate to convey all the rights, titles and interests of said Antoinette, in said property, or to such portions thereof as shall be thus conveyed, pursuant to any such arrangement of compromise, as herein contemplated, as effectually as the said Antoinette could do were she of lawful age and acting in the premises.

Sec. 2. In case either the said Pelagie Rutgers or Louis Clamorgan should die before this act shall be executed, the survivor of them is hereby empowered to execute the same; and in case both should die before the same is executed, then the St. Louis Circuit Court, shall appoint some competent person to execute the same.

Sec. 3. The second section of the act to which this is an amendment, is hereby repealed.

The controversy concerning the title, it seems, was between persons representing Mackay, the heirs of Arend Rutgers, and claimants under the deed and will of Arend Rutgers, to-wit: Louis Rutgers, Pelagie, his wife, and his daughter, Antoinette. Mackay's will authorized his wife to convey certain portions of his estate, under certain circumstances. A conveyance of the land in controversy was made by her, in 1825, to Arend Rutgers. Rutgers conveyed the land in 1826, to Ledue and Provenchere, as trustees, for the use of Louis Rutgers, a free mulatto boy living in their family. In 1834, Louis Rutgers and wife and said trustees conveyed this back to Arend Rutgers. About the same time Arend Rutgers and wife conveyed to Ledue and Magwire, trustees, for the use of Louis Rutgers during his life, and after his death, to the use of Pelagie, his wife, during her life, and after her death, for the use of the lawful children of said Louis, and in default of such children, to revert to said Arend Rutgers. The only child of Louis Rutgers and Pelagie, his wife, was Antoinette, who was an infant when the act above recited was passed. The mother, Pelagie, died in 1867, Louis having died in 1847.



---

Thomas v. Pullis, et al.

---

M. P. Ledue, was dead in 1845, and a trustee was appointed in place of Magwire. Thomas, the plaintiff, was married to Antoinette in 1858.

The property in controversy, together with other portions of the thirty-three arpents, under the acts of the legislature above stated, and by virtue of the compromise recited, as in contemplation by said acts, was conveyed by Pelagie Rutgers, (her husband Louis being dead), acting for herself and her daughter Antoinette, to Edwin R. Mason, for \$35,000. On the same day Mason conveyed to trustees for Pelagie and Antoinette, certain portions of this tract, to the use of Pelagie, during her life, and if she should survive her daughter to her in fee, but if Antoinette survived, to Antoinette in fee, etc. Antoinette was of age in 1859. Her mother left, by will, all her estate to the daughter. The mother died in 1867, and the daughter married in 1868. In 1859, Antoinette, when of age and unmarried, executed a deed to Henry Clamorgan, for lots, 13, 14 and 15, in Park addition, and described them as bounded North by lot 12, (the one now in dispute) "now owned by Pullis & Bro." In the same year she executed to John J. Anderson, a deed for block 152, to which she was advised by her attorney, and valuable improvements were made on these lots—of which she was aware. By the will of her mother, she also received \$35,000, or \$40,000, resulting from the compromise, and these facts are claimed to estop her now from denying the validity of the compromise.

The principal question in the case, is as to the validity of the two acts of the legislature, above recited. There were three conflicting claims to the thirty-three arpents, and in two of the three there were infant parties. A compromise had been agreed on, as the first act recites, and the act was simply to authorize the father or guardian, to pass the title of the minor claimant. The conveyances authorized, were made subject to the approval of the St. Louis Probate Court, by the first act. The second act simply authorized the mother and the next friend of the infant, to effect any compromise and execute deeds, and in the event of the death of either, author-

ized the survivor to act, and the approval of the Probate Court was dispensed with. These acts were claimed to be void.

There are three decisions of this court, on acts of a similar character, all agreeing to their validity. (*Stewart vs. Griffith*, 30 Mo., 13; *Gannett vs. Leonard*, 47 Mo., 205; *Ship vs. Klinger*, 54 Mo., 238.) In the last case the court refused to examine the question, on the grounds that vast amounts of property had been transferred on the faith of such acts. It is true, however, that the facts in each of the cases referred to, differed from those in the present case. In *Gannett vs. Leonard*, the property of the infants was wholly lost, to the amount of \$60,000, as the legislature had required no bonds of the person authorized to convey the title. Yet the title of the purchasers was upheld. The power of the legislature to authorize some one, guardian, administrator or any one else named in the act, to pass the title of an infant, seems to be settled, not only by the decisions of this court, but by the decisions of the courts of other States. The cases are cited in the briefs, and it is unnecessary to repeat them here. We see nothing in the peculiar facts of this case to distinguish it from the cases cited. That the minor's title in this case was, under the legislative authority, converted from a vested remainder to a contingent remainder, is very much relied on in the argument by counsel to show the invalidity of the acts. But in *Gannett vs. Leonard*, the infant's property was converted into nothing, and yet the title of the purchaser was sustained. It is a question of power, and whilst it is conceded that the legislature has no power to transfer A's property to B, or to authorize any one else to do so—supposing A and B, to be adults and competent to transact their own affairs—the legislature may authorize the guardian, father or mother of a lunatic, infant or idiot, to transfer the estate of the minor, lunatic or idiot. It will be observed that the title of Pelagie and her daughter Antoinette was a disputed one. That the claimants under Mackay and Rutgers, really had no valid title, is not important. This was ascertained after the decision of this court

in the case of *Norcum vs. D'Oench*, but it was a matter of conjecture before. The adults had an undoubted right to compromise. If the legislature has power to authorize third persons, guardians, fathers, mothers, etc., to convey the undisputed title of an infant, without regard to insuring the proceeds for the benefit of the infant, why should they be deprived of the right to authorize the compromise of an unsettled claim?

It is not pretended that under the last act of 1851, the deeds of Pelagie were not in strict conformity to the act, but the act is claimed to be unconstitutional, because it authorized Pelagie, the mother, to make such compromise as she pleased, and thus abandon the interests of her daughter who had a vested remainder after her life estate. This objection is untenable. The power being conceded, its exercise, in one form or another, is beyond the reach of judicial investigation. In the case of *Gannett vs. Leonard* (47 Mo., 205), Judge Bliss, said: "I have not known a case where the legality is made to depend upon the precautions adopted to secure to the beneficiary the proceeds of the sale. And in that case, where the title was unquestioned, the title of the infant or minor children was conveyed in conformity to the power granted, and the proceeds totally lost to the infants. Yet the title of the grantee was upheld. These decisions here and elsewhere, are based on the power of the legislature, where there is no constitutional restriction, to authorize the sale of lands belonging to minors, lunatics or idiots, by such persons as the legislature may designate. The restrictions and safeguards provided by the legislature must be complied with, but the validity of the law does not depend on the wisdom or propriety of these restrictions.

In this case Pelagie Rutgers was authorized to convey Antoinette's title, as effectually as Antoinette could do, were she of age; and it is now urged that Pelagie, in the conveyances she made under this act, and in the conveyances made to her, disregarded her daughter's interest, and converted a vested remainder, which Antoinette had, into a contingent remain-

der. As the act gave her full power to compromise and convey her daughter's title, we are unable to see how this change in the interest of Antoinette could affect its validity.

Upon the second point, we think the acts of Antoinette, after she arrived at full age, amounted to a ratification of the compromise. Her deed to John J. Anderson, in 1859, was made under the advice of her attorney, who was fully informed of the acts of the legislature, and of the compromise made by Pelagie under those acts.

The deed to Henry Clamorgan, describing the property conveyed, as bounded by the lot now in dispute, and therein stated to be owned by Pullis & Brother, may be regarded as a mere declaration; but these two deeds in connection with the fact that for fifteen years after this, she lived in sight of the property now sued for, and saw valuable improvements on it, without any claim, are sufficient to constitute an estoppel. The deed to Anderson was not simply an acquiescence or a mere declaration, it was a positive act, based on a recognition of the compromise—and conveying land conveyed to her by the compromise—made upon due consultation with her counsel, who was fully apprised of the condition of the title.

We had occasion to examine this subject in the case of Huth vs. Carondelet Marine Railway and Dock Company, *ante* p. 202 wherein the doctrine maintained in the early decisions of this court, was re-affirmed—that the mere inaction of an infant after coming of full age, would not constitute a confirmation. But the present case falls within the principle in Ferguson vs. Bell's administrators (17 Mo., 347), where the infant, after attaining majority, received a part of the purchase money; and here a sale and conveyance of part of the land received under the compromise would seem to be quite as clear and distinct an act of affirmation as the reception of part of the purchase money, especially when attended with an acquiescence of nearly fifteen years, with a full knowledge of the valuable improvements made on the lots sold.

Judgment affirmed. The other judges concur.

---

Horner, Adm'r v. Nicholson.

---

WILLIAM H. HORNER, Administrator of PATRICK McDONOUGH  
Respondent, vs. DAVID NICHOLSON, Appellant.

1. *Damages caused by falling of building while being re-built—Liability of owner and contractor.*—In suit for injuries received by an employee in making alterations in, and additions to, an old building; where the damages were shown to have resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building, or where the removal of floors and the construction of new walls were accomplished under the direction of defendant previous to the letting of the work to the contractors, and so unskillfully or negligently arranged as to have caused the injuries complained of, defendant will be liable, although at the time of the casualty the work had been let out to a contractor and was being carried on under his management and control.

*Geo. P. Strong*, for Appellant.

*W. H. Horner*, for Respondent.

I. Defendant was liable for any injury resulting to plaintiff from the dangerous manner of erecting the buildings, if the falling thereof occurred either from the inherent danger attending the use of the old wall and floors as directed in the contract, or from the doing of the extra work, or day's work, as done, or directed, or permitted, by defendant or his agents, in a careless, dangerous or negligent manner. (Shearm. & Red. on Neg. [2d Ed., 1870], 98; City of St. Paul vs. Steitz, 3 Minn., 297; Storrs vs. Utica, 17 N. Y., 104; Ellis vs. Sheffield Gas Co., 2 Ellis & B., 767, [cited in Shear. & R. on Neg., p. 106, N. 3]; Hill. on Torts, [3d Ed., 1866], 423, § 3; 437, §§ 11, 12, 13; 445, 446, § 14; Garretzen vs. Duenckel, 50 Mo., 111, citing Howe vs. Newark, 12 Allen 49; Thames Steamboat Co. vs. Hous. R. Co., 24 Conn., 53, 55; Gregory vs. Piper, 17 Eng. C. L., 455; O'Rourke vs. Hart, 7 Bosw., 513, 514; Gilbert vs. Beach., 4 Duer., 430; Carman vs. Steubenville & R. Co., 4 Ohio, St., 416-17; Hill. on Torts, Vol. 1, [3d Ed.] p. 116 *et seq.*, §§ 38, 39, 42, 47.)

NAPTON, Judge, delivered the opinion of the court.

This action was to recover damages alleged to have been occasioned by the falling in of a floor and wall in a building

which the defendant was putting up at the corner of Fifth and Walnut Streets in the City of St. Louis. The plaintiff was injured by the fall of this wall and floor, and alleges that it was occasioned by the unskillful, negligent, and careless construction of the building, under the directions of defendant or his agents.

The defenses set up in the answer were of two kinds, first, that the work was good and substantial and safe and not done in the careless or negligent manner alleged, and second, that if the work was insecure, its insecurity arose from the carelessness of contractors or their employees, and occurred after the defendant had let out the entire work to different contractors, to be done in conformity to certain plans and specifications furnished by his architect, and that after this his responsibility for the work ceased.

It appears, that in the Summer of 1868 the defendant purchased the church building and parsonage attached thereto at the corner of Fifth and Walnut, with a view to convert it into a large business house now called "The Temple;" that in the course of the Summer months, he caused the south wall of the church to be taken down, at least partially, and an iron front substituted, and he also had the north and south walls of the parsonage removed, and the lower floor raised two or three feet, so as to be on a level with the proposed floor of the church building, and the second floor raised, and the joists of course removed from their original position and placed in the west wall in holes cut for that purpose, also a new wall of 9 inches, built up against the old west wall of the parsonage building, up to the second floor; and he intended to have it fastened into the old wall by anchors, for the reception of which holes were also perforated in the old wall. All this work was done, as the plaintiff alleges, and attempts to prove, by men employed by defendant, and before any contracts were made; though there is no proof to the contrary on this point.

The disaster occurred a day or so after this nine inch wall was completed, and whilst the west wall was left standing some eight or ten feet above the second floor. The contracts were



---

Horner, Adm'r v. Nicholson.

---

all designed to authorize and require the contractor to make use of the old walls and other materials, so far as they were safe and proper, of the safety and propriety of which the architect was to judge. The defendant sought to establish that the west wall of the parsonage was sound and strong and better than a new one; that the changes in the floor and joists did not diminish or impair its strength; that the falling of the floor and wall was occasioned by the removal of a prop or brace by one of the carpenters employed by the contractor, and for which defendant was in no wise responsible.

Upon this point the evidence was conflicting. Whether the old wall was a good and sound one, whether the removal of the joists contributed to weaken it, whether the addition of a new nine inch wall to it operated to drag it down—whether the only cause of its falling was the removal of a prop under the joists—are questions of fact, which the jury were more competent to decide than we are.

The testimony of the defendant was mainly directed to throw the responsibility of the downfall of the floor and wall upon an employee of one of the contractors after the defendant had ceased to have any control over the work, and had turned over the work to the contractors. The accident certainly occurred after this—but if the defendant's plans of re-building, as recommended by his architect, required the use of materials and structures that were unsafe, his responsibility, for any injury accruing by reason of such plans, was not transferred to the contractors.

The instructions given were as follows: Instructions for plaintiff—No. 1:

The jury are instructed, that the fact, that the building in question was built under contracts between defendant and other parties, will constitute no defense to this action, if the jury find from the evidence, that the said building fell upon and injured plaintiff, without negligence or fault on his part, and that the falling thereof was occasioned by its construction in accordance with certain specifications and plans contained in said contracts, and that the manner of building the same,

---

Horner, Adm'r v. Nicholson.

---

as required in said plans and specifications, was a dangerous and negligent manner. And in determining whether the manner of building the said building, as required or permitted by said plans and specifications, was a dangerous and negligent manner, the jury should consider the materials to be used and the manner of using the same in constructing the said building.

Instruction for plaintiff—No. 2.

If the jury believe from the evidence that defendant or his agents, in the erection of the building on the north-west corner of Walnut and Fifth streets, carelessly used old walls, or caused the old floor to be raised in a careless manner, or carelessly left the old parsonage wall standing above the floor in a dangerous manner; and that, in consequence of either of said acts, the building or any part of it fell upon this plaintiff, without any fault of his, while he was rightfully in said building, then they will find for the plaintiff, whether the building was let by contract or not; and in estimating carelessness they must take into consideration the age of the walls used, as well as the manner in which they were used.

Instruction for plaintiff—No. 3.

If the jury find for the plaintiff, they will assess his damages at such a sum as in their opinion will be a reasonable compensation to him for the bodily pain suffered, outlays incurred, and time lost in consequence of the injuries sustained; and if the jury believe the plaintiff's injuries are of a permanent character, they ought to estimate their extent, and add to the above damages a sufficient amount to reasonably compensate plaintiff for such permanent injury to his person.

Instruction given by the court—No. 1.

By negligence on defendant's part, is meant the negligence of himself and his agents or servants, but not the negligence of parties working on the building under contracts with defendant, exercising an independent calling and not subject to his control; nor the negligence of the employees of such

---

Horner, Adm'r v. Nicholson.

---

parties, unless their negligent acts were done by defendant's order. And in determining whether defendant was negligent or not, the jury should take into consideration the material of which that part of the building, by the falling of which plaintiff received the injuries, was constructed, and the manner in which such material was to be used by the terms of the contracts read in evidence.

Instruction given by the court.—No. 2.

If the jury believe from the evidence that the fall of the floor and wall of the building on Walnut street, which was being erected for defendant, was not occasioned by any negligence or unskillfulness of defendant, or of any person employed by him, and working under his control, they will find for defendant, even though they may find that such fall was occasioned by the carelessness or unskillfulness of some of the hands employed by, and under control of, the contractors who were putting up said building for defendant.

Instruction for defendant—No. 1.

The court instructs the jury, that the defendant is not responsible for the injury sustained by the plaintiff, unless it was occasioned by the negligence of himself, or of those employed or controlled by him. If, therefore, the jury believe from the evidence, that the work upon the building, where plaintiff was injured, had been let out by defendant to mechanics and builders, under contracts, and that at, and previous to, the time of the accident, they were performing said work under said contracts, and that said work was not under the direction of defendant or his servants, then they will find for defendant, even though the jury may believe the fall of the building may have been occasioned by the negligence of said contractors or their employees; if the negligence of defendant or his agents or servants did not occasion said fall.

Instruction for defendant.—No. 2.

The court instructs the jury, that they will disregard all testimony concerning the condition and fall of the walls of

the church, unless such fall was occasioned by the negligence of defendant or his servants, and also contributed to the fall of the parsonage wall by which plaintiff was injured.

There can be no objection taken to these instructions. The defendant had the law explained to the jury as he asked. After the jury took the case, they reported that they could not agree, and some of them stated that they wished to know how far defendant was responsible for the acts of those working upon said building after the contractor took charge of it, or whether defendant's responsibility continued through the period of putting up said building, also what constitutes a man an agent or servant of defendant and makes him responsible for his acts. The court declined to instruct the jury further than the instructions we have quoted.

The plaintiff having got a verdict, and the case being taken to the General Term and from there appealed to this court, the only question which this court is authorized to examine is the propriety of the instructions. And to these instructions, abstractly considered, there is no serious objection made, but it is urged that the evidence did not authorize them.

There can be no question of the liability of defendant, if the damage resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building, or if the removal of the floors and the construction of the new wall were accomplished under the directions of the defendant previous to the letting of the work to contractors, and so unskillfully or negligently arranged as to have caused the injuries complained of, and the instructions so declared the law, and the authorities cited in the brief of plaintiff's counsel, if any are needed on such a point, sustain the instructions. Indeed, no serious objection has been made to them, except that the evidence did not support the hypothesis on which they are based.

The evidence, as is usual in such cases, is very contradictory, somewhat obscure, and consists very much of opinions of architects, mechanics and workmen, who differ very much in re-

gard to the causes of the disaster. There is no question of law involved. The court might be of opinion, that the preponderance of opinion on the part of the witnesses was decidedly for the defendant, but the law has intrusted the decision of such matters to another tribunal, and with this decision the court has no power to interfere.

The court that tried the case very properly declined to give additional instructions. The instructions given applied to all the points upon which the jury sought additional instructions. It was impossible to make them more specific upon either point of defense relied on. As to rendering judgment on a verdict found before the death of plaintiff, our statute (Wagn. Stat., 1050, § 7,) expressly authorizes it, notwithstanding his subsequent death, and the statute is merely a codification of the common law, which never allowed a delay occasioned by the court to change the condition of a suit. There is nothing in the point that a jury trial was requisite upon the motion to make the administrator a party. Juries are not necessary to the decision of a motion.

Judgment affirmed. The other judges concur.

—0—

STATE OF MISSOURI to use of WM. J. CLIFFORD, Plaintiff in Error, vs. HENRY W. BELDSMEIER, et al., Defendants in Error.

1. *Attachment—Plaintiff's bond may be sued on without plea in abatement—Damages for detention of money by garnishee.*—Under the statute of 1865, (Wagn. Stat., p. 189, § 42,) defendant in a suit by attachment, in case of judgment in his favor on the merits, may sue on the plaintiff's attachment bond, without having entered his plea in abatement. (State to use of Roe vs. Thomas, 19 Mo., 613.)

In such suit he may recover damages growing out of the detention by garnishment of money due him, not exceeding of course the legal rate of interest.

*Error to St. Louis Circuit Court.*

*M. Dwight Collier, with Hitchcock, Lubke & Player, for Appellants.*

*E. C. Kehr*, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Henry W. Beldsmeier brought suit by attachment against William J. Clifford, on a contract respecting lumber. The ground alleged in the affidavit was non-residence. The usual bond was given by Beldsmeier with his co-defendant Schloemann as surety. Clifford being in fact a non-resident of the State, could not successfully plead in abatement and therefore pleaded to the merits, and in this was successful. Upon the termination of that suit he thereupon in the name of the State instituted the present one against Beldsmeier and his surety on the attachment bond. At the trial evidence was adduced to the effect above stated, and that A. H. Grantlite who, at the time the suit by attachment was commenced, owed Clifford a balance of about \$1,300, in consequence of having been garnished in that suit, refused to pay the money to Clifford until the latter would give a bond of indemnity in the sum of \$4,000; that by this means Clifford lost the interest on the money for some two months and was put to an expense of \$3.50 to have such a bond prepared and stamped in order to procure the money; that the loss of the interest computed at ten per cent. amounted to \$13; that the expenses of Clifford's trip from his home in Wisconsin to St. Louis, to attend the trial in the attachment suit, was \$41.90; hotel bills \$17.50; six days of lost time at \$3.00 per day, \$18.00; cost of taking depositions \$16.00; attorney's fees in defending that action \$100. The court on this state of facts refused declarations of law asserting Clifford's right of recovery, and gave judgment for the defendants, and this was affirmed in the General Term. Material changes have taken place in our law concerning attachments since the year 1835, the giving of a bond as a condition precedent to the issuance of a writ was not then requisite. After the return of the writ it was in the discretion of the court to require the plaintiff to give security to prosecute his suit with effect and without delay, and that he would pay all damages which might accrue to the defendant



or any garnishee in consequence of the attachment. (R. S. 1835, p. 81, § 38.) The act of February 6, 1837, required a bond with the above conditions before the writ was issued, to be executed to the defendant or garnishee. But it was not until the passage of the act of February 13, 1839, that the defendant was allowed his plea in the nature of a plea in abatement; and if the issues raised by such plea were found for the plaintiff the cause proceeded, but if for the defendant, it resulted in a dismissal of the suit at the costs of the plaintiff, and he and his surety were declared liable on their bond for all damages occasioned by the attachment, or other proceeding in the cause. (Laws of 1838-9, p. 7, §§ 11, 12.)

The law underwent a still further change in 1845. For, although the provisions of the sections just cited remained unchanged, yet, the conditions of the bond were made more numerous and consequently more onerous. They were, that the plaintiff should prosecute his action without delay and with effect, refund all sums of money that might be adjudged to be refunded to the defendant or found to have been received by the plaintiff and not justly due to him, and pay all damages that might accrue to any defendant or garnishee by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon. (R. S. 1845, § 4, p. 135.) The law thus remained until the year 1865, when a further change was made by providing that if the issues presented by the plea in abatement were found for the plaintiff, the cause should proceed, but if for the defendant, the attachment should be abated at the cost of the plaintiff, and he and his sureties should be liable on their bond for all damages occasioned by the attachment; but the suit should proceed to final judgment on the cause of action therein alleged, as though commenced originally by summons alone. (1 Wagn. Stat., p. 189, § 42.) Prior to the enactment of the law which allowed the defendant in attachment suits his plea in abatement, there can exist no rational doubt that if he proved victorious in a trial on the merits, an action in his favor lay on the bond, for otherwise, that instrument, whether executed

by the plaintiff under the order of the court as provided in the act of 1835, or by him as a condition precedent to bringing the suit as provided in the act of 1837, would be of no avail whatever, and utterly inoperative.

It is easy to perceive then from the above brief history of our attachment law, that the plea in abatement was a privilege granted to the defendant, and did by no means tend to either curtail or control the conditions of the bond. On the contrary, those conditions became more rigid in inverse proportion to the facilities afforded the defendant to defeat the plaintiff by a dilatory plea; as if the legislature, while at the same time providing additional grounds upon which attachment process might issue, were desirous of preventing the hasty and inconsiderate use of such process. Notwithstanding the provisions of section 42 of the existing law above referred to, that the attachment should abate upon the defendant's plea in abatement becoming successful, that section does not in any way limit or avoid the conditions of the bond given for the prosecution of the suit, and those conditions will be deemed broken if from any cause the suit is not prosecuted without delay and with effect, whether any plea in abatement be filed in the cause or not. And it is to be observed, that our statute differs widely on this point from the laws of those States mentioned in the authorities cited by defendants in support of their theory in this particular.

Those decisions hinged upon the question whether the conditions of a bond had been violated, which provided against the "wrongful" suing out of the attachment, where the plaintiff failed to maintain his action. And the courts of the States of Alabama, Kentucky and Tennessee, under a statute of that kind, very properly held, "that the bond is not conditioned for the successful prosecution of the suit, but that the order for the attachment was not wrongfully obtained." (Sharpe vs. Hunter, 16 Ala., 765; Petit & Owen vs. Mercer, 8 B. Mon., 51; Smith vs. Story, 4 Humph., 169.)

By the very terms of our statute, however, the failure of the plaintiff to successfully prosecute his action, will *per se* sub-

ject him to liability therefor on his bond,—if we are to give to the language employed in that instrument its usual effect and significance; so that this subject of the plaintiff's liability in this regard, is after all narrowed down into the simple question: Does the bond mean what it says? If the proposition advanced by the defendants, that the relator is not entitled to a recovery because of his defending and defeating the action against him on the merits, instead of by means of a dilatory plea, be construed as correct, this result will follow: That the statute will become an engine of incalculable and intolerable oppression in the hands of any unscrupulous man, who, with impunity, could attach the property of a non-resident, keep the case pending in court from year to year, and then dismiss or bring it to trial at his leisure without incurring any liability beyond the paltry expense of an ordinary suit, simply because the defendant, although not his debtor, was unable to successfully plead in abatement. The law does not perpetrate such gross injustice and palpable absurdity. At a time when the conditions of an attachment bond were the same as under the present law, Gunn sued Roe, a resident of Iowa, in the St. Louis Circuit Court, by attachment, attached the goods of Roe, but did not retain them for any length of time as the friends of the latter immediately executed a forthcoming bond. Roe being a non-resident, and having therefore no ground for resisting the attachment, plead to the merits, defeated his adversary, and then brought suit on the bond and recovered for his direct damages and costs, the expenses incurred by him in the attachment suit for taking depositions; attorneys' fees; his hotel and traveling bills while attending the suit; the damages caused by detention of the goods and the amount expended in procuring their release; for value of his time and services, while attending, and interest on the money expended by him in said suit. He also sought to recover for injuries done to his credit and business, but this was denied him, and on his appeal to this court, the judgment was affirmed. (State to use of Roe vs. Thomas, 19 Mo., 613.) And although the atten-

---

State, ex rel. v. Heath.

---

tention of this court was only directed to the point last mentioned, yet at the same time it is worthy of remark, that it was tacitly conceded by the able counsel employed in the defense, that, aside from consequential injuries, there was no question of Roe's right to recover. That case is indential with the present one.

In conclusion, without entirely sanctioning all the declarations of law asked by the relator, I am satisfied that he was entitled to recover on the bond for any direct loss, damage or expense produced or occasioned "by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon;" and that this language is sufficiently comprehensive to include all the damages for which this suit is brought, not excepting the alleged injury sustained by relator in the loss of the use of his money which as a matter of course cannot exceed the legal rate of interest on the sum detained.

Judgment reversed and the cause remanded. All the judges concur.

—o—

STATE OF MISSOURI, *ex rel.*, TOWNSHIP BOARD OF EDUCATION,  
Township 45, Range 6 East, Plaintiff in Error *vs.* WIL-  
LIAM H. HEATH, Auditor of St. Louis County, Defendant  
in Error.

1. *Township organization—Webster Groves School District—Power to extend limits of—Constr. Stat.*—The town of Webster Groves having been laid out and a plat thereof having been filed in the proper recorder's office (§ 1, Act March 17th, 1868; Adj. Sess. Acts, 1868, p. 164), under § 1 of the Act of March 23rd, 1868, *Id.*, p. 164, the Webster Groves district had power to change and extend its limits, although the town was not incorporated. Notwithstanding the use of the word "corporation" in the last mentioned statute, the design of the legislature was not to confine the operation of its provisions to towns, etc., which had been incorporated.

*Error to St. Louis Circuit Court.*

*Frank J. Bowman*, for Plaintiff in Error.

*Charles E. Pearce*, for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

The plaintiff filed a petition for a mandamus against the defendant as auditor of St. Louis county, to compel him to levy an estimate, reported and returned to him by the township clerk for sub-district No. 4 of township No. 45, range 6 east, for the year ending April, A. D. 1872, on certain lands named in said petition.

An alternative writ was issued, to which the defendant made a return, in which he stated that on or about the 5th day of September, 1860, a plat of the town of Webster Groves was duly filed and recorded in the recorder's office of St. Louis county; that afterwards, on the 25th day of August, 1868, the said town of Webster Groves was duly organized into a school district in conformity to the statutes in such case made and provided, and called "The Webster Groves school district." That afterwards, on the 28th day of November, 1868, the said school district was duly extended, according to the statutes in such case provided, and made to comprise certain limits in the return stated, and which includes the lands in which the plaintiff asks the taxes to be levied on the estimate in favor of district No. 4 of township No. 45, of range No. 6. It is claimed by the return that the land in controversy is situated in the Webster Groves school district, and has been taxed there for school purposes for several years, and that it is not included in district No. 4, before referred to; so that the main issue presented by the pleadings was, as to whether the property sought to be taxed was situated in the one district or the other.

The court at special term found for the defendant, and vacated or set aside the alternative writ of mandamus, and rendered judgment against the plaintiff for costs. The plaintiff appealed to the general term of the Circuit Court, where the judgment of special term was affirmed, and the plaintiff has brought the case here by writ of error.

The case was tried in the Circuit Court on the following agreed statement of facts.

First—that a plat of the town of “Webster Groves” was duly filed and recorded in the recorder’s office of St. Louis county, together with the territory attached thereto, on the 5th day of September, 1860; but no portion of the territory in dispute was included in said plat; Second—that the original school district of “Webster Groves” was organized on the 25th day of August, 1868, comprising in its limits the said town of Webster Groves, and in accordance with the provisions of the statutes in such case made and provided, concerning cities, towns, and villages, and acts amendatory thereto, that the board of directors of said school district was duly, and in accordance with the statute, elected on the second Saturday in September, 1868, and that on the 18th day of September, 1868, permanent organization was made by the election of president, secretary and treasurer; Third—that on the 28th day of November 1868, the limits of said district were extended and the boundaries set forth in description marked “Ex. A.” and herewith filed, were duly adopted by the Board of Education of Webster Groves school district; that said boundaries do not extend one and one-half miles from said town of Webster Groves, and that upon the passage of the resolution extending said limits the secretary of said board transmitted copies of the same to the clerk of the school township affected thereby; Fourth—that the returns and plats made to the auditor of St. Louis county by the clerk of said township 45, and by said board of Webster Groves school district for the fiscal years 1869, 1870, and 1871, accorded in the boundaries of school district territory with the boundaries adopted by the Webster Groves school district on the 28th day of November, 1868, with the exception of certain territory set off to the Fairview school district, by agreement between the Webster Groves school board and the board of said Fairview district, and that the taxes for the support of public schools were assessed for said years 1869, 1870, and 1871, in accordance with said boundaries, and were paid according to said assessment. \* \* \* Eighth—that the plats returned to said auditor by the said township clerk of



township 45, and by the said Board of Education of Webster Groves School district for the fiscal year ending April, 1872, both comprised within their respective limits the territory in dispute in this cause; Ninth—that the said auditor has caused taxes to be assessed upon property within the Webster Groves school district, and upon the property within the limits of said sub-district No. 4, for school purposes, for the year ending April, 1872, in accordance with the plats returned for the year 1871; Tenth—that at a regular meeting of the Board of education of township 45, September 17, 1870, the following resolution was passed: “Resolved, that the boundary line between district No. 4 and the Webster Groves school district be so changed and straightened as to correspond with the central line of Bismarck avenue, when extended eastwardly and westwardly;” Eleventh—that the territory intended to be attached to sub-district No. 4 by this resolution is the territory now in dispute in this case, also that all due notices in the premises were given; Twelfth—that prior to November 28, 1868, the territory now in dispute was embraced within the limits of sub-district No. 4; Thirteenth—that the original school district of Webster Groves was not established by the township board of education of township 45, 6 east, and no authority given by the said township board for the extension of the limits of said Webster Groves school district.”

The foregoing are all of the facts appearing in the record of the case necessary to be noticed in order to a proper understanding of the questions to be considered by this court.

It will be seen that the main, if not the only question to be decided is, whether the “Webster Groves school district” had the power under the laws of this State to change and extend its limits so as to include the lands or territory in dispute? By the first section of chapter 47 of the general statutes of this State (general statutes of 1865, p. 274) it is provided as follows: “Any incorporated city or town in this State, plat as laid out and recorded with the territory attached, or hereafter to be attached to said city, town or vil-

lage, for school purposes, may be organized into and established as a single school district, in the manner and with the powers hereinafter specified; but the provisions of this chapter shall not apply to any city, town, or village, or any part thereof, which is now governed, as to schools, by any special law."

By an explanatory act of the General Assembly of this State, approved March 17, 1868, it was provided as follows: "Section 1. Section one, chapter forty-seven, title sixteen, general statutes of 1865, is hereby declared to mean, and to have been designed and intended to comprehend and mean, that any city, town or village, the plat of which had previously been duly filed and recorded in the recorder's office of the county wherein the same is situate, together with the territory attached, or which shall hereafter be attached to any such city, town or village for school purposes, may be organized into and established as a single school district in the manner and with the powers in said chapter forty-seven afterwards provided; but that the provisions of said chapter should not apply to any city, town or village or any part thereof, which was at the time governed as to schools by any special law." (Sess. Acts of 1868, p. 164). It will be seen that the object of this explanatory act was to apply the provisions of the law authorizing the organization of cities and towns into separate school districts, to all cities, towns and villages in the State, whether incorporated or not, provided they had a plat of their towns or villages filed and recorded in the recorder's office of the county where situate, as is provided by law.

It is shown by the admitted facts in this case, that the town of Webster Groves had been regularly laid out and a plat thereof filed and recorded as the law directs, in the year 1860, and that after the passage of this explanatory act of 1868, said town was duly organized into a school district, in conformity to the law on the subject, and elected a board of education for the transaction of its business. The General Assembly of the State of Missouri passed another act on the subject of schools in cities, towns and villages, which was approv-

ed on the 23d of March, 1868 (Sess. Acts of 1868, p. 164), by which it was provided as follows:

"Section 1. It shall be lawful for any board of education of any city, town or village in the State of Missouri, at any meeting thereof, to extend the limits or boundaries of the territory attached, for school purposes, to any city, town or village, to any distance, not to exceed one and one-half miles from the limits of the corporation of any such city, town or village, as may, in their estimation, advance the general interest of education; and upon the passage of a resolution by any board of education of any city, town or village, extending the limits or boundaries of the territory attached for school purposes, to any city, town or village, as aforesaid, it shall be the duty of the secretary of the board to transmit copies of the same, to the clerk of each school township affected thereby, without delay, and thereupon, the said township clerk shall cause maps of their respective townships, provided for in section 13 of chapter 46 of the General Statutes, to be changed accordingly."

It is not pretended in this case, that the town of Webster Groves has not complied with each of the before-quoted sections of the different statutes on the subject, and it is not insisted, that the school district called Webster Groves district has not, by its board of education, extended its limits so as to include the lands upon which the tax is sought to be levied in favor of district No. 4, as set forth in the petition in this action, provided that the last above-quoted section of the statutes shall be held to be applicable to unincorporated towns and villages. It is insisted, on the part of the plaintiff, that the only cities, towns and villages which are authorized to extend their limits for school purposes to the distance of one and a half miles from their original limits, are incorporated cities, towns or villages, and that Webster Groves not being an incorporated town, the attempt to extend its school limits, under the last-named act of the legislature, is void, and that therefore the land included within said extended lines is taxable in the adjoining school districts. This depends on the

construction to be given to the act of the 23d of March, 1868, before referred to. The act of the 17th of March, 1868, and of the 23d of March, 1868, should both be construed together in order to get at the intention of the legislature. Before the act of the 17th of March, above referred to, was passed, only incorporated cities, towns or villages could be organized into separate school districts, under the laws of 1865. But by the said act of the 17th of March, all distinction between incorporated and unincorporated cities and towns was abolished and the law was declared to be and mean, that all cities, towns or villages, the plat of which had been previously filed, &c., may be organized into and established a single school district, &c. Under this law, all that was necessary was that the town must be laid out and a plat thereof filed in the proper recorder's office, to entitle it to the benefits of the act. Immediately after the passage of this act, or within six or seven days thereafter, on the 23d of March, 1868, the act was passed by the same legislative body providing that it should be lawful for any board of education of any city, town or village in the State of Missouri, at any meeting, &c., to extend the limits or boundaries of the territory attached for school purposes to any city, town or village, to any distance not exceeding one and one-half miles from the limits of the corporation of such town, &c.

I cannot believe that it was the intention of the legislature, so soon after abolishing all distinction between incorporated and unincorporated towns, to, by the use of the words "corporate limits," as used in this act, confine its provisions to cities and towns which were incorporated. If that had been the intention, with what propriety would the act commence by saying that the board of education of *any city, town or village in the State of Missouri, etc.*? Why not say the board of education of any incorporated city, town or village in the State of Missouri, etc., if it was intended to confine the act to such cities or towns? I think it is clear, that the intention was to apply the law to all cities, towns or villages, which had been laid out and a plat recorded as provided

for in the act just passed on the 17th of March, and that the words "corporate limits", as used in the said act of the 23d of March, were perhaps carelessly used by the draughtsman of the act, but were intended only to designate the boundary line of the town or city as designated by the plat recorded in the recorder's office. This is the only way to give any rational effect to the different parts of the two acts.

It follows that the judgment rendered for the defendant by the Circuit Court was properly rendered, and that the judgment must be affirmed. The other judges concur.

—o—

JOHN J. O'FALLON, Respondent, vs. DAVID NICHOLSON, Appellant.

1. *Lease—Release from "further" liability—The meaning of word "further."*—A release by a lessor of his lessee from "further" liability under his lease is not a release from liability for taxes already accrued and which by the terms of the lease, the lessee had assumed to pay. The word "further" as there used means "future."

*Appeal from St. Louis Circuit Court.*

G. P. Strong, for Appellant.

Bakewell & Farish, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff as heir of John O'Fallon, deceased, on the covenants of a lease which the deceased had made to the defendant of a lot of ground in the city of St. Louis. By the terms of the lease the defendant covenanted to pay all the taxes as part of the rent, and if he failed to do so, the landlord reserved the right to pay the taxes, and to recover them back from the lessee. The lease had more than twenty years to run. After the death of the plaintiff's ancestor, the defendant made default in payment of the taxes for 1869, and the plaintiff paid them and brought this

suit on the covenant in the lease to recover them back. The taxes so paid amounted to between six and eight hundred dollars. There were several other heirs of John O'Fallon, but this land had, by a partition between them, been assigned to the plaintiff. The defense relied on by defendant was that in 1870, he had assigned his lease to Benjamin O'Fallon, and that the plaintiff assented to this assignment by becoming a party thereto, and by the terms of such assignment the defendant was released by the plaintiff from the payment of these taxes.

The only question presented for our consideration is, whether such a release was embraced within the terms of the assignment. In deciding this point it is only necessary to refer to such portions of the assignment as bear upon the question. The assignment is in the shape of an indenture between the defendant and his wife, of the first part, and the plaintiff of the second part, whereby, in consideration of seven thousand five hundred dollars paid by the party of the second part, the parties of the first part assign to the party of the second part the leasehold, &c. In a subsequent part of the indenture it is provided, that "the party of the second part for and in consideration of the said assignment doth for himself and heirs, representatives and assigns, covenant to, and with, the said David Nicholson, his heirs and legal representatives, that he, the said party of the second part will, well and truly keep and perform all and singular the conditions and covenants in said lease contained, and thereby agreed to be kept or performed by said Nicholson, as lessee thereunder; that he will pay all rents, taxes and assessments therein reserved, which shall accrue or become due or payable after the date hereof; and that he will in all things whatsoever save and keep harmless and indemnified him the said David Nicholson, his heirs and representatives from and against any and all loss, costs, payment or expense whatever, which by reason of anything in said lease contained, shall, or may to him or them hereafter, in any wise accrue, and from and against any claim or demand against him or them, by reason of any liability under said



lease, hereafter to accrue to any person claiming under said lessor. And whereas, it is provided by said original lease, that said lessee therein named, to-wit: the said David Nicholson, party of the first part herein, shall not assign said lease until certain new buildings therein provided for, shall have been erected, except by the written consent of said John O'Fallon, lessor therein, now deceased, his heirs or legal representatives; and whereas, the said John O'Fallon having died intestate in the year 1865, leaving as his heirs at law the following named persons now living, to-wit: Caroline O'Fallon Pope, daughter of said John O'Fallon, wife of Charles A. Pope, James J. O'Fallon, Benjamin O'Fallon, (party of the second part herein,) John J. O'Fallon and Henry A. O'Fallon sons of said John O'Fallon, deceased, and Caroline O'Fallon widow of said John O'Fallon, deceased: Now therefore, these presents further witness, that in consideration of the said assignment above set forth, and of certain other valuable considerations them thereunto moving, they, the said Caroline O'Fallon, Charles A. Pope and Caroline O'Fallon Pope, his wife, James J. O'Fallon, Benjamin O'Fallon, John J. O'Fallon, and Henry A. O'Fallon, (by his guardian duly appointed and qualified) do hereby consent to the assignment hereinbefore set forth, and do hereby severally release the said David Nicholson from further liability under the covenants of said original lease, and accept the party of the second part in his stead under the foregoing covenants."

The breach of the covenant in the original lease to pay the taxes had already accrued before this indenture of assignment was executed, and it is upon this breach that this suit was predicated. The question for us to decide is whether the plaintiff, by joining in this assignment for the purpose of giving his consent thereto, and accepting Benjamin O'Fallon as the lessee, and as the party alone to be held for future breaches of the covenants of the lease, intended by the language used, to give away six or eight hundred dollars to the defendant.

It is very clear from the terms above quoted, that Benjamin O'Fallon was only to be held for future breaches of the cove-

---

Barker v. Patchin.

---

nants of the lease. It is also equally clear, that the heirs intended to accept him instead of the defendant for future breaches of the covenants in the lease. Then what was meant by the words "that they released the defendant from further liability under the covenants of the lease?" It is manifest to my mind that they intended to release him not from breaches of the covenants that had already accrued, but from any further breaches that might thereafter happen. The word "further" in the connection in which it is used, means "future." There seems to be no room to doubt, that from the whole tenor of the language quoted, the parties contemplated future, and not existing breaches of the covenants, from which the defendant was to be released.

Let the judgment be affirmed. All the judges concur.

—o—

JOHN W. BARKER, Respondent, vs. LYMAN W. PATCHIN, Appellant.

1. *Practice, civil—Continuance, affidavit for—What essential to.*—An affidavit for continuance ought to negative any inference that it is made for vexation or delay, and where the application is grounded on the absence of a witness, it should state at what time deponent expects to be able to procure his testimony.

*Appeal from St. Louis Circuit Court.*

Lackland, Martin & Lackland, and Goode, for Appellant.

A. M. Thayer, J. S. Coe, and S. N. Taylor, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff's petition contained three counts. The first count was for work and labor done, and materials furnished by plaintiff, setting forth the various items, amounting in the aggregate to \$1,751.25. The second count was for build-

ing a stone wall or fence under a special contract, for the price of \$3,000, on which defendant had paid \$1,500, leaving the balance unpaid. The third count was for coping on walls and flagging, amounting to \$500.

To the first count defendant answered, denying that he owed the alleged items, and charging that all of the work referred to in the first count had been done under a written contract, a copy of which, showing the terms, &c., was filed as an exhibit with the defendant's answer, and defendant alleged that all of said work, &c., was paid for by satisfying the written contract. To the second count the defendant answered denying that the work had been performed according to the contract. The answer admitted that the work charged in the third count had been performed. As a further answer the defendant set up by way of counter-claim that the plaintiff had not performed his part of the written contract above referred, and claimed damages for non-performance and bad work, &c. Before the parties went to trial this counter-claim was withdrawn leaving the balance of the answer standing.

This suit was brought on the 15th day of January, 1872, and had been pending from that time till the 4th day of February, 1873, when it was called for trial. The defendant applied for a continuance and for that purpose filed the following affidavit:

Horatio D. Wood, being duly sworn on his oath, says, that the defendant cannot safely proceed to trial in the above entitled cause, owing to the absence of Wm. McManus, D. C. Gray and L. W. Patchin, whose testimony is material to the cause; that there are no other witnesses known to affiant, or in attendance, whose testimony could be procured in time, upon whose testimony the defendant can safely rely to prove the particular facts that the absent witnesses are expected to prove; that this affiant, acting as attorney for defendant, believes that he cannot safely go to trial without the testimony of the absent witnesses, and that they are not absent by the consent, connivance, or procurement of the defendant,

---

Barker v. Patchin.

---

or of this affiant. This affiant states, that on the 31st day of January, 1873, he placed in the hands of a deputy sheriff of this county, a subpoena, containing the names of the witnesses, Gray and McManus, giving also the residence of said McManus, and the place of business of Gray; that said subpoena was placed in the hands of a deputy by the name of Boatwright, for service, and that said deputy has made his return upon said subpoena, stating that said McManus is in New Orleans, La., and that Gray is not in the State. Said deputy, Boatwright, informed this affiant, this morning, that he called at the residence of McManus, and was informed by a member of his family that he was absent in New Orleans, and would return about the 1st of March, 1873, and that he called at the place of business of said Gray, and was informed that he was absent from the State. Your affiant states, that they are, as he is informed and believes, residents of this city, and have been such for many years past; that he had no knowledge of their absence from the State until informed as aforesaid, nor has he, at any time, been aware that said witnesses contemplated being absent from the State; that the affiant expects to show by the witness D. C. Gray, who was the agent of the defendant, and as he has stated to this affiant, that defendant did not order the materials furnished and work done, as set forth by the plaintiff in his petition, as not included in the written contract set forth by the defendant in his answer, which said work and materials are claimed by plaintiff as extra work and materials. That this affiant expects to show by the witness McManus, who, as your affiant is informed and believes, has examined the quality of the work done, and materials furnished, that the material, particularly that employed in the steps, is of a defective and inferior quality, and that the stone work was done in a defective manner. This affiant further states that the defendant is absent in Europe, and is, as he has been informed, detained by sickness. That this affiant expects to show by the defendant, that he had no contracts whatever with the plaintiff, for any work whatever, outside of that stipulated for in his written con-

---

Barker v. Patchin.

---

tracts. That the present occupation of McManus is unknown to affiant, but his residence is on Lucas Avenue and Beaumont street. That the occupation of D. C. Gray is that of commission merchant, and his place of business 214 Christy Avenue. That the costs of the previous continuance have been paid.

[SIGNED.]

HORATIO D. WOOD.<sup>1</sup>

Sworn to and subscribed before  
me, February 4th, 1873.

[SEAL.]

[Signed.] JNO. LEWIS, Cl'k.

The court overruled the defendant's motion for a continuance and he excepted. The case was then submitted to a jury for trial. The plaintiff gave evidence strongly tending to prove the several counts of his petition. In order to prove that the items sued for in the first count were extra work outside of the written contract mentioned and referred to in defendant's answer, the plaintiff offered to read the copy of this contract which the defendant had filed as an exhibit with his answer. The defendant objected to this copy as evidence, but the court overruled the objection and it was read to the jury and the defendant excepted.

Under instructions given by the court the jury found a verdict for the plaintiff for the several amounts claimed by him. As there is no point raised on the instructions, it is unnecessary to recite them. The defendant filed a motion for a new trial which was overruled and judgment rendered for plaintiff, which was affirmed at General Term, and the defendant has appealed to this court.

1. The first point presented for our consideration, is the action of the court in overruling the defendant's motion for a continuance. It does not appear from the record that the case had ever before been called for trial. It had been pending for more than a year, but whether it had been reached on the docket at all, or called and continued at the instance of either party, is not shown by the transcript before us. But whether this be considered as a first application for a continuance or not, the affidavit is defective in two essential particu-

lars. It does not allege that the application is not made for vexation or delay, nor does it allege that the defendant expects to be able to procure the desired testimony for the next or any subsequent term of the court. An affidavit for continuance ought positively to negative any inference that it is made for vexation or delay. It is also essential in all such applications, for the applicant to inform the court that he can procure the testimony, and at what time he will be able to do so. For these reasons, this affidavit was defective, and the continuance was properly denied.

2. The court did not err in permitting the plaintiff to read the copy of the written contract between him and the defendant, which had been filed with the defendant's answer. Although the defendant had withdrawn his counter-claim founded upon this contract, his answer raising the question whether the items in the first count were a part of the special contract, or extra work, still stood and formed the main issue to be tried on that count. It was by this copy of the contract that this issue was raised. And the plaintiff had the right to read it to the jury, to show what the real issue was, and then prove that the work claimed as extra did not fall within its provisions. The defendant himself had made it proper evidence for that purpose by filing it with his pleading.

Judgment affirmed. The other judges concur.



JOHN LONG, Plaintiff in Error, *vs.* THOMAS HIGGINBOTHAM,  
Defendant in Error.

1. *Land titles—Possession of part with claim of the whole—Adverse possession connected with deed.*—The doctrine of constructive possession which follows the title where there is no adverse possession, is applied to one who takes actual or corporeal adverse possession under color of title; and he is held to be possessed of the contiguous land covered by the instrument under which he enters and which he claims by virtue of such an instrument. But such possession is never based upon a claim merely. There must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries as well as actual possession of a part.



---

Long v. Higginbotham.

---

2. *Deeds—Grants from United States—What certainty required in.*—The same certainty of description is not required in deeds from the government to individuals, or between grantor and grantee, as in case of sheriffs' deeds and other proceedings *in invitum*. In the former, parol evidence is allowed to explain and identify and locate.

*Error to Washington Circuit Court.*

*G. J. Van Allen*, for Plaintiff in Error.

The deeds introduced showed color of title. (Ang. Lim., [5th Ed.] p. 408, and cases cited; *Fugate vs. Pearce*, 49 Mo., 441.) Possession had been shown under that color of title. (*Crispen vs. Hannavan*, 50 Mo., 536.)

*Reynolds & Relfe*, for Defendant in Error.

The "south fourth" of a quarter section gives no description at all. When such a description occurs the deed gives no color of title. (*Long vs. Wagoner*, 47 Mo., 179; *Home vs. Williams*, 51 Mo., 252; *Clemens vs. Rannels*, 34 Mo., 579; *Campbell vs. Johnson*, 43 Mo., 250.)

NAPTON, Judge, delivered the opinion of the court.

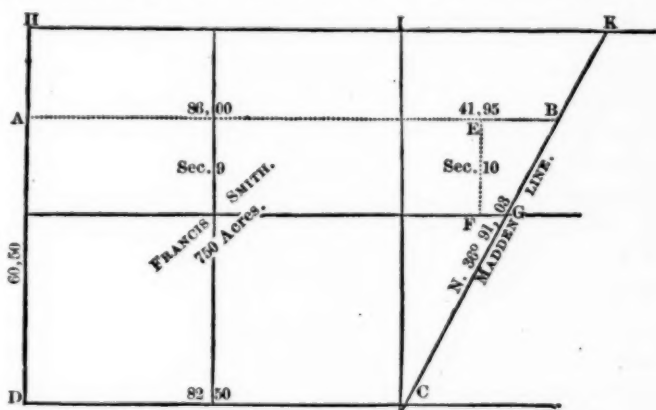
This was an action of ejectment to recover possession of a small portion of what is termed the South fourth of the North-west fraction quarter of Section 10, Township 38, Range 3. The defendant admitted possession of so much of the tract claimed as was included in the South-east fraction quarter of the North-west quarter of said section 10.

The land in controversy was claimed to be a part of a tract of land of about 578 acres, alleged to have been originally purchased of the United States by John Smith, (T.) at what period does not appear; but at the date of a conveyance made by his daughter Ann White, in 1847, to F. J. Smith, it was surveyed by Eugene O'Mara, the County Surveyor of Washington county, as the "Bellefontaine Mines." This survey was made at the instance of said F. J. Smith or his agents, and said Smith about that time purchased 40 acres in section 16, making the whole tract about 618 acres. Smith and the Longs had been in possession of this tract ever since,

until about 20 months before this suit was brought, when the defendant put a tenant on the South-east fraction quarter of North-west quarter of section 10, and within the lines of the old survey.

There were three deeds given in evidence by the plaintiff,—one from Ann White to F. J. Smith in July, 1847,—one from F. J. Smith to W. Long in June, 1856, and the third from W. Long and wife to the plaintiff. In all these deeds the disputed land is called the South fourth of Northwest fraction quarter of section 10.

*The following plat shows the location of the land in dispute.*



A. B. C. D. O'Mara's Survey.  
H. I. C. D. Sec. 9.

C. K. Madden Line.

E. B. G. F. Land in controversy.  
A. D. 60 chains and 50 Links.

It appears from the plat of survey of O'Mara in 1847, which was in evidence, that from the North-east corner of section 16, which is also the South-west corner of section 10, the western line of an old survey, made doubtless before the government surveys, called the Madden survey, ran diagonally through the South-west and North-west quarters of this section and made them fractional. And the survey, made by O'Mara, commencing at the South-west corner of section 9, and running North sixty chains, fifty links on the line between sections eight and nine, was then run due east across

sections 9 and 10, till it intersected the West line of the Madden survey, and *thence down the said West line of the Madden survey* in a South-westerly direction till it reached the North-east corner of section 16, and thence to the beginning.

There is no dispute concerning any of the land in this survey except the claim of defendant to the 33 acres which is in the South-east quarter of the North-west quarter of section 10, outside or West of the Madden line. This land, is beyond dispute, included in the O'Mara survey of the Bellefontaine or Smith tract, as it was generally called:

There were three surveys of this Bellefontaine tract, made by three different county surveyors,—all at the instance of the plaintiff or those under whom he held. One in 1847, by O'Mara as heretofore stated, a second made by Sholer, in 1857, and a third in 1872 or 1873, by Will, the then County Surveyor. They all adopted the West line of the Madden survey as the East line of the Bellefontaine tract—and of course all include that part of the South-east quarter of the North-west quarter of section 10, which defendant claims.

From a correspondence with the Commissioner of the General Land Office, it appears that all the land embraced in the O'Mara survey has been patented to John Smith, (T.) under an entry at St. Louis, No. 16205, but at what date the entry was made or the patent issued does not appear. This correspondence was offered but excluded by the court.

The defendant who took possession of the 33 acres of land in dispute about 20 months before this suit was brought, derived his title from one Lancaster, who entered the South-east fraction quarter of the North-west quarter of section 10, in 1836, and had a patent issued in January, 1852. It is not claimed that he ever had any possession of it, until about two years before this action was commenced.

There was in 1866, an attempt by the defendant to have this South-east quarter of North-west quarter of section 10 surveyed—but the survey was not completed. When the surveyor reached the Madden line, the plaintiff was sent for and some conversation occurred about the titles, which is im-

material and the survey was abandoned. No trees were blazed or other marks made or corners established.

There is a mass of testimony in the record concerning possession and acts of ownership by plaintiff. The details of this evidence it is unnecessary to state. It was clear that the plaintiff or those from whom he derived possession had been in possession of this tract, called the Bellefontaine Mines or Smith tract, from 1847 up to the entry of the defendant in 1871 or 1872; had various buildings, fences, mineral diggings on different parts of the tract, and cut rails and saw-logs, &c., throughout the land. There is some conflict of testimony as to the extent and character of these acts of ownership on the specific piece of ground in dispute. There was an old race-track on it and no portion of it was enclosed and no buildings were on it, nor were there any diggings on it. There is evidence however, that occasionally the plaintiff or his employees cut rail timber on it. The defendant beyond doubt never had possession nor claimed any, until he took possession in 1871.

The plaintiff asked instructions to the effect, that if the court finds that the plaintiff, and those under whom he claims title, had actual possession under color of title of a part of the tract of land described in the deed from D. W. Long and wife, and claimed the whole tract continuously for over ten years, and exercised during that time the usual acts of ownership over the whole tract so claimed, then such possession shall be deemed possession of the whole tract; and if it is found that the S. 1-4 of the N. W. Qr. of Sec. 10 was included within the whole tract so claimed, the verdict must be for plaintiff.

The court refused the instructions—gave a verdict and judgment for defendant.

The theory upon which the court below tried this case appears to have been, that the descriptive words in the various deeds offered in evidence were ambiguous and uncertain, and therefore, so far as the South 1-4 of the N. W. Qr. of Sec. 10 was concerned, no title or color of title was shown—and that the surveys were erroneous, and therefore did not help the case of the plaintiff.

But we do not consider it material whether these descriptive words in the deeds were ambiguous and uncertain as to render them null so far as this particular part of the tract conveyed is concerned, or not. The plaintiff relied on a prior possession of about 24 or 25 years. The only question is, whether these deeds and surveys gave him a color of title sufficient to protect his possession. If the invalidity of the deeds is held to destroy all color of title, the doctrine of possession under color of title is destroyed also, for if the deeds were valid and conveyed title there would be no need for calling in the aid of a possession of any length of time or under any circumstances. The survey of 1847, purporting to be a survey of the Bellefontaine or Smith tract fixed the outer boundaries of that tract by an actual designation of its lines. This survey was made by the County Surveyor of the county, and was duly returned and filed and recorded in the office. Whether it erroneously included the S. E. Qr. of the N. W. Qr. of Sec. 10 within its limits is not a question on an enquiry into the question of possession. That it did so include the land in controversy is clearly shown and, indeed, not controverted.

There is no doubt of the general principle, that a party in possession of a part of a tract, claiming the whole, is considered in possession of the whole. The application of this principle to cases as they arise is more difficult. In *Griffiths vs. Schwenderman*, 27 Mo., 412, and in *McDonald vs. Schneider*, *Id.*, 405, this general principle was held not to be applicable in cases where both parties occupied a part of the same tract, claiming under adverse titles. But the decisions in those cases have no application to the present, in which it is conceded that the defendant was never in possession of the S. E. Qr. of the N. W. Qr. of Sec. 10, until just before the institution of this suit, and long after the possession of plaintiff had ripened into a title—supposing such possession to have been established.

The doctrine on this subject is correctly set forth by this court in *Fugate, &c., vs. Pierce*, 49 Mo., 447, thus: "The doctrine of constructive possession, which follows the title where

there is no adverse possession, is applied to one who takes actual or corporeal adverse possession under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters and which he claims by virtue of such an instrument. But such possession is never based upon a claim merely, and it has never been so held; there must be a deed purporting to convey the whole, or some proceeding or instrument giving color and *defining boundaries*, as well as actual possession of a part."

In the case now under consideration there were several deeds through which plaintiff claimed and held the Bellefontaine tract, including the land in controversy. But those deeds may be regarded, so far as this question is concerned, as too ambiguous to pass title or designate boundaries, but the survey made in 1847 under those deeds, pointed out the exact boundaries of the tract and included the land in dispute. If these deeds, taken in connexion with the surveys, did not give color of title, it is difficult to conceive what would. Had the patents to John Smith (T.) been in evidence and those patents contained the same description with the deed (which they doubtless did) no additional strength would have been added to plaintiff's possession. For a patent from the United States if the description of the subject was void for uncertainty, could have no more efficacy than a deed from A. to B. with the same want of apt words of description.

The law applicable to deeds from the government to individuals, and to deeds between parties grantor and grantee, is not so strict in its requirements of certainty in their description of the lands conveyed, as in sheriffs' sales and other proceedings *in invitum*. In the former, parol evidence is allowed to explain and identify and locate. Here no parol evidence is used for that purpose, but an authentic survey made by an officer authorized and appointed by law to make such surveys. And not merely the plat of survey as found in the proper office, but the survey on the land, the blazes on the trees, the corners, &c., all pointed out to any one who wanted information the exact exterior boundaries of the "Bellefontaine



Mines" or "Smith Tract." The east line having been fixed as identical with the west line of the Madden Survey, it was apparent, that the S. E. fr. qr. of the N. W. fr. qr. must be within the said survey of O'Mara. Nor is it material that such survey was wrong, in view of the question of possession. It was a *bona fide* possession beyond doubt held under a *bona fide* chain of title by deeds and surveys.

And to prove the *bona fide* character of this possession, we see no reason why the correspondence with the commissioner of the General Land Office at Washington should be excluded. It did not establish any title, it may be conceded, nor tend in that direction, but it served to explain possession by leading to the conclusion that the County Surveyor, O'Mara, actually surveyed the land designed to be conveyed by the United States. It will be borne in mind, that the Madden Survey with its West line running diagonally through the N. W. qr. of Sec. 10 made the sub-divisions of that quarter fractional—and it may be that the entry and patent of Smith (if there were such entries and patent) would by the number of acres called for have clearly shown that what was called the South 1-4 meant the South *end* of the fractional quarter—and would therefore properly include both the S. E. and the S. W. fr. quarters. This is merely conjectural, however, but if it should be the fact, then it would merely show, as is often the case, that the government sold the same land twice—in which event, of course the oldest title would prevail, there being no question of possession in the case.

But this case, as it was tried on the evidence, presented a mere question of possession under color of title—a question of fact which the court cannot undertake to decide.

The judgment must therefore be reversed and the cause remanded. Judges Vories and Sherwood concur. Judges Wagner and Adams absent.

TIMOTHY O'CONNOR, Appellant, *vs.* THEODORE KOCH Respondent.

1. *Practice, civil—Pleading—Distinctness and brevity in—Motion to amend pleading for uncertainty—Motion stricken out on same ground.*—A motion to reform a petition on the general allegation that the pleadings are irrelevant or redundant is not sufficient. **C** The motion should, with at least a reasonable degree of certainty, set forth the particulars wherein the pleadings are uncertain. Good practice not only requires the petition to have certainty and brevity, but it also requires some certainty and distinctness to be observed by the defendant.
2. *New trial—Motion for—Not necessary, when.*—Generally, a motion for a new trial is necessary in order to bring the matter complained of to the attention of the trial court and save matters of exception which occurred in the progress of the trial. But when the whole case is decided upon demurrer to the petition, and judgment is rendered thereon, or where the case is dismissed upon motion, and the motion and exceptions are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record, it is not necessary or usual to file a motion for a new trial.
3. *Judgment for costs a final judgment.*—Where a suit is dismissed, judgment against plaintiff for costs is a final judgment from which appeal will lie.

*Appeal from St. Louis Circuit Court.*

John F. Darby, for Appellant.

I. "Motions to strike out parts of pleadings should contain the parts sought to be stricken out; or those parts should be so designated that they can be readily ascertained." (Pierce vs. McIntyre, 29 Mo., 423.)

II. Again: "All motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reasons not so specified shall be urged in support of the motions." (Genl. Stat. 1865, ch. 165, § 48, p. 662.)

In the case before the court, no specifications whatever were given in the motion. A mere general indefinite allegation, but no definite specification was given in the motion as was required by law. (Casey vs. Barcroft, 5 Mo., 128; Patterson vs. Hollister, 32 Mo., 478.) Again: "In the construction of a pleading for the purpose of determining its effect; its allegations shall be liberally construed with a view to substantial justice between the parties. (Genl. Stat. 1865, § 37, p. 661; see also McClothlin vs. Hemery, 44 Mo., 350.)

The petition itself shows that it was written in pure English. The sentences were all grammatical. As to what constitutes a "clear and concise statement," I submit to the court a few illustrations:

Proverbs: Chapter VII, 9th Verse.—"In the twilight, in the evening, in the black and dark night."

Same book and Chapter, 16th Verse.—"I have decked my bed with coverings of tapestry, with carved *works*, with fine linen of Egypt."

Again, Judges: Chapter V, Verse 27.—"At her feet he bowed, he fell, he lay down; at her feet he bowed, he fell; where he bowed, there he fell down dead." Then again, look at the first chapter and the first verse of the Gospel of St. John, as contained in the New Testament: "In the beginning was the word, and the word was with God, and the word was God."

The above examples will suffice. The words "twilight," "in the evening," "in the dark and black night," in the first quotation given are not repetitions, any more than the few adjectives in a few sentences of the plaintiff's petition are repetitions; and so of the other quotations and illustrations, which are so manifest to the court.

We have heard of eminent divines, so fully competent to judge, being carried away and enraptured by the sublime and inspired passages in the writings of the prophet Isaiah; or praising the plea of Judah for Benjamin before his brother Joseph in Egypt, as amongst the finest pieces of eloquence and concise expressive utterances to be found in the English language, which men of less culture and scholarly attainment would be incapable of appreciating.

The plaintiff in this suit would as soon have expected the defendant's counsel to have found fault with, and criticised the passage above quoted from Holy Writ itself, as not being concise, or of their being a "repetition" as for him to have so made the general charge without specification as was done in this case.

As to the general objection made by the defendant that the "petition is merely a statement of the plaintiff's evidence," there is not the least ground to sustain the objection. The petition itself shows that it was a plain and concise statement of facts constituting the cause of action.

If, in the petition, the plaintiff should have stated that he could prove by one or more witnesses that the defendant, Koch, was driving his horse Tobe (if that was his name), at a furious rate, on and along Broadway, in the city of St. Louis, on the twenty-first day of March, eighteen hundred and seventy-one; that the horses neck was bowed, his tail up, his nostrils distended, his mouth open and foaming, and the froth flying to the wind behind therefrom as rapidly as the sparks from a locomotive on a railroad going at great speed; that Mr. Koch held his horse with a tight rein as he sat in the buggy, still urging, still pressing the spirited animal to greater speed all the while by talking to him and scolding him with such expressions as, "go it my boy," "spread yourself," "astonish the natives," and the like, &c.; that the people and foot passengers on Broadway were attracted to him, and astonished at the recklessness of the driver in dashing through the public thoroughfare of a populous city in such a breakneck, careless manner, that a gang of dogs joined in the pursuit, yelping after the rapid driver, unable to overtake him; that men ran from the sidewalk to the middle of the street to keep in full view of the desperate, rapid driver; that everybody on the street, even some of the old market women, partook of the general excitement, and with amazement exclaimed "goodness gracious," raising both hands expressive of their surprise. till the general crash and breaking-down occurred, when several persons remarked, "I thought that fellow would kill somebody or break his own neck,"—this would have been stating evidence. But nothing of the sort was stated in the petition, and if, as the petition stood and was filed, the evidence as here stated had really been offered, the plaintiff would have been entitled to recover, no doubt.

As a general thing, in all courts when any particular objec-

tion or exception to any language, statement or phraseology of proceedings is taken, the party making the exception is bound to bring it to the attention of the court by quoting the particular sentence or phraseology excepted to, in *hæc verba*, so that the court may see fully and be informed of the nature of the objection.

*E. C. Kehr*, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the St. Louis Circuit Court to recover damages alleged to have been sustained by the plaintiff from the wrongful act of the defendant, in violently running his buggy against the wagon in which plaintiff was riding along the public streets of St. Louis.

For a proper understanding of the case, the petition, although a long one, will be set out in full. It is as follows: "Timothy O'Connor, the plaintiff in this suit, complains of Theodore Koch the defendant in this suit, and sets forth his complaint in this, his petition, as follows: That is to say, he, the said plaintiff, was seated in a spring wagon, belonging to him, said plaintiff, and was driving his horse attached to the same at a moderate and gentle gait on Broadway, one of the free open public streets in the city of St. Louis, in the county of St. Louis and State of Missouri, where he, the said plaintiff, had a right to be, to use and to travel with and in his spring wagon, in said public street and highway, on the twenty-first day of March in the year of our Lord eighteen hundred and seventy-one, when he, the said defendant, Theodore Koch, came driving with great fury, and riding in a buggy-wagon behind and in the rear of said plaintiff, and in such manner that the plaintiff did not know that the said defendant was approaching him, the said plaintiff, and at the time when he, said plaintiff, did not see him, said defendant, and when said plaintiff was entirely unconscious of danger, he, said defendant, who was thus riding and driving rapidly in the rear of and behind said plaintiff, on Broadway, in the city of St. Louis as aforesaid, did drive his said buggy with such force and violence against the spring wagon

in which he, the said plaintiff, was sitting and driving at a moderate gait on Broadway as aforesaid, that he, the said defendant, did break down, demolish and upset the said spring wagon of him, said plaintiff; whereby he, said plaintiff, was knocked out of said spring wagon and thrown with such force and violence in and upon the pavement and stones in the street in Broadway as to bruise, hurt and injure him greatly. The sudden shock and violence with which he, the said Timothy O'Connor, was hurled from his said spring wagon and thrown in the street by said defendant as aforesaid, caused great bodily pain and suffering to him, said plaintiff, to relieve which, he, said plaintiff, was necessarily compelled to and did, employ medical aid and assistance to soothe his pain and relieve him from the distress and injuries so inflicted upon him, said plaintiff, by the defendant running over, upon, upsetting and breaking down said plaintiff's spring wagon, as aforesaid; by which said plaintiff incurred great expense, to-wit, the sum of twenty dollars; and said plaintiff was, by reason of the injuries so inflicted upon him as aforesaid by said defendant, and the soreness of his body and the bruises on his limbs, for the space of ten days unable to attend properly to his duties and business pursuits in life, which also resulted in serious loss and damage to said plaintiff; that in consequence of said defendant's conduct in breaking down and upsetting said plaintiff's spring wagon as aforesaid, the same was greatly damaged, and it cost him, said plaintiff, a considerable sum of money, as much as ten dollars to repair the same, and did otherwise injure and destroy said plaintiff's property greatly.

Said plaintiff avers, that the street was broad and there was ample room and sufficient space for said defendant to have passed him, said plaintiff, on said Broadway at the time; and that he, said defendant, could have indulged in and enjoyed his fond desire for fast driving his fast and spirited horse in and along the great thoroughfare, and have gratified his pride in attracting the gaze, attention and admiration of all the pedestrians and passers-by, to the fleetness of the spirited and noble animal which he drove, without his running over



and breaking down said plaintiff's spring wagon, and injuring and bruising his person and destroying his property as aforesaid. Wherefore said plaintiff says he has been greatly injured and damaged by said defendant, in his person and property in manner aforesaid, to the amount of one thousand dollars, for which sum he asks judgment, together with his costs," &c.

The defendant appeared at the return of the summons and filed the following motion, to-wit :

"Now at this day comes the defendant and moves the court to compel the plaintiff to reform his petition; and in case plaintiff shall refuse so to reform his petition as to make it conform to the rules of pleading, then that said petition be stricken from the files. And in support of this motion the defendant assigns the following reasons, to-wit; 1st, Because said petition is not a plain and concise statement of the facts constituting plaintiff's supposed cause of action. 2nd, Because the same abounds in unnecessary repetitions. 3rd, Because the petition is merely a statement of the plaintiff's evidence and not a statement of his cause of action. 4th, Because the same is full of irrelevant matter wholly foreign to the allegations of a legal right."

At the October Special Term of the said Circuit Court this motion was sustained by the court, when the following entries appear to have been made :

"Monday, November 13, 1871."

"The court having duly heard and considered the motion to reform the petition herein, and being fully advised of and concerning the premises, doth order that said motion be sustained."

"Saturday, November 18, 1871."

"Now at this day comes the said plaintiff, by his attorney, and it appearing to the court that said plaintiff declines to plead further herein, it is therefore considered by the court, that said plaintiff's petition be dismissed at the costs of said plaintiff, and that execution issue therefor. On motion of said plaintiff by his attorney, an appeal is allowed him to the general term of the court from the decision herein."

A bill of exceptions is filed in the cause, making the motion and orders thereon part of the record, by which it is shown that the plaintiff at the time excepted to the action of the court in sustaining the motion filed by the defendant, and in dismissing the plaintiff's petition.

The bill of exceptions also shows, that the following rule of court was in force at the time that the defendant's motion was sustained and the petition dismissed :

"Rule 22d. When a motion is made to strike out a part of any pleading, it shall distinctly point out the page and line or lines of the page proposed to be stricken out, and shall embody a copy of the same, or the beginning and ending clauses thereof."

The case was appealed by the plaintiff to the General Term, where the judgment of the Special Term was affirmed, from which the plaintiff appealed to this court.

The propriety of the ruling of the Circuit Court in sustaining the motion of the defendant to compel the plaintiff to reform his petition, and in dismissing the plaintiff's petition is brought in question in this court. By the 20th section of article 5 of the law of this State concerning "Practice in Civil Cases" it is provided "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of the adverse party; and when the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, and when they fail in any other respect to conform to the requirements of the law, the court may require the pleadings to be made definite and certain and otherwise to conform to law, by amendment."

By the 23d section of the same act it is provided that "no party shall be required to state evidence in his pleadings, or to disclose therein the means by which he intends to prove his case." I might also refer to other sections of the statute by all of which it is apparent that the legislature intended to secure as far as possible directness and brevity in pleadings."

The means provided by which these ends are to be secured, or a violation or disregard of which are to be corrected, is provided for in the 20th section before set forth.

The means provided are of two different characters, intended to remedy two different characters of defects in pleading. First, where irrelevant or redundant matter is inserted in a pleading, the remedy is to strike out the irrelevant or redundant matter on motion. Second, where the allegations or denials in a pleading are indefinite or uncertain, so that the precise nature of the charge or denial is not apparent, &c., the court may require the pleading to be made definite and certain on motion of the adverse party.

If the plaintiff's petition is objectionable, the question is, whether the objections to the petition come within the first or second class of objections before stated. I think the plaintiff's petition cannot be said to be either so indefinite or uncertain that the precise nature of the charge is not apparent. The charges in the petition are, that, on a certain day named, the plaintiff was riding in a spring wagon upon a public street in the City of St. Louis and was driving along the street, as was his right to do, at a moderate gait, and that the defendant came up behind the plaintiff without his knowledge, driving a spirited horse to which was attached a buggy-wagon, in a furious and rapid manner, and that, although the street was wide and open with sufficient room for the defendant to pass without striking or injuring the plaintiff or his wagon, yet the defendant in his rapid and furious driving drove his buggy against the wagon of plaintiff and upset and injured the same, and also bruised and wounded the plaintiff; by which he was injured and damaged, &c.

These are the substantial allegations and charges in the petition, and although the plaintiff has used a great many words in making the charges, and used some language wholly irrelevant and impertinent, yet the charges themselves are certain and cannot be misunderstood by any one. The defendant would have no difficulty in ascertaining exactly with what he was charged, and could have no difficulty in answering the same.

The petition in this case is obnoxious to the fault of having irrelevant and redundant matter inserted therein, but the mo-

tion of the defendant was not founded on this objection, and if it had been, the rule of court before set forth required the defendant to set forth in his motion the particular redundant or irrelevant matter sought to be stricken out, which was not done in the motion of the defendant. If there had been no such rule of court, or if the motion was properly made to require the plaintiff to make his petition more definite and certain, or to require him in any other matter to conform his petition to the requirements of the law, the motion and order of the court should, with at least reasonable certainty, set forth the particulars in which the petition was uncertain or otherwise defective, so that the plaintiff could know from the motion and order of the court in what particular his petition was adjudged to be defective, and in what he was required to amend it; otherwise the plaintiff might omit in his amended pleading the very matters which the court deemed to be material, and retain the matters deemed by the court to be redundant. The plaintiff had a right to know what in his petition was deemed to be improper or redundant, and what was deemed to be proper, so that he could either amend in conformity to the view of the court, or stand by his petition as it was, and appeal to a higher court.

In this case it was impossible from the motion of the defendant and the order of the court, that the plaintiff could know in what particular the court deemed his petition defective, so that it could be conformed to the views of the court.

It must be kept in mind, that good practice not only requires the petition to have certainty and brevity, but it also requires some certainty and distinctness to be observed by the defendant, so that the defects, if any, in the plaintiff's petition could be intelligently and certainly remedied so as to conform to the ruling of the court. This was not done.

It is objected in this court by the defendant, that no motion for a new trial was filed in the Circuit Court, and that, therefore, this court will not review the errors of the court below. It is very true, that in most cases a motion for a new trial is necessary, in order to bring the matter complained of to

the attention of the trial court and save matters of exception which occurred in the progress of the trial. Several cases have been decided in this court to that effect. But where the whole case is decided upon demurrer to the petition, and judgment rendered thereon, or where the case is dismissed upon motion, and the motion and exceptions are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record, it is not usual or necessary to file a motion for a new trial for the mere purpose of having the court to twice hear the same motion or demurrer. (Bruce vs. Vogel, 38 Mo., 100; Parker vs. Han. & St. Joe. R. R. Co., 44 Mo., 415.)]

The court in this case sustained the defendant's motion. The plaintiff refused to amend his petition and the court dismissed the suit and rendered judgment against the plaintiff for costs. We held in a similar case, where the plaintiff's suit was dismissed, and judgment rendered against him for costs, that the judgment in such case was a final judgment from which the plaintiff could appeal. (Bowie vs. Kansas City, 51 Mo., 454.)

The other judges concurring, the judgment will be reversed and the cause remanded.

—o—

CHARLES M. WILLIAMS, Defendant in Error, vs. JOHN S. MELLON, Plaintiff in Error.

1. *Promissory note—Defense—Failure of consideration.*—An answer to a suit on a note which admits its execution, but alleges that it was "without any consideration whatever," sets up a good defense.

*Error to St. Louis Circuit Court.*

John E. Jones, for Plaintiff in Error.

W. F. Causey, for Defendant in Error.

The general plea of want of consideration was insufficient. (Lybert vs. Jones, 19 Mo., 86; Northrup vs. Miss. Val. Ins.

Co., 47 Mo., 435; *Glenny vs. Hitchens*, 4 How. Pr., 347; *McMurray & T. vs. Gifford*, 5 How. Pr., 14; *Russell vs. Clapp*, 7 Barb., 482; *Burrall vs. Bowen*, 21 How. Pr., 378; *Ryle vs. Harrington*, 14 How. Pr., 59; *Gushee vs. Leavitt*, 5 Cal., 160; *Jolliffe vs. Collins*, 21 Mo. 338; *Van S. Pl.*, [N Y.,] 1 Vol. 2 Ed., p. 401; *Doan vs. Moss*, 20 Mo., 297.)

Want of consideration is a defense like set-off, non-*assumpsit*, accord and satisfaction, limitations, &c., and any facts constituting said defenses should be pleaded, or evidence under our present system will be excluded, that is offered to prove the same.

NAPTON, Judge, delivered the opinion of the court.

This suit was on a promissory note, the petition being in the ordinary form and containing the usual allegations. The answer admits the execution of the note sued on, but avers and so charges the fact to be "that the said note was so made without any consideration whatever." On the trial, the defendant offered, in support of his plea, evidence to show that there was no consideration for the note; but this evidence was rejected, and the sufficiency of this answer presents the only point for consideration. The objection to the plea is, that it does not state facts which would avoid the implication arising from the execution of the note. But where it is averred that there was no consideration whatever for the note, it is not easy to see how a more specific allegation of the facts could be made. If the note was a mere voluntary obligation, without any consideration whatever, that is an end of the case and the pleader could not more specifically, or in plainer words state the fact, and under this plea he must of course establish this allegation.

We do not understand that the new code of pleading has established any other rule in this respect, than the one recognized under the old system. In *Northrup vs. Mississippi Valley Ins. Co.*, (47 Mo., 444,) it is said that "the defendant, if he intends to rely on new matter which goes to defeat or avoid the plaintiff's action, must set forth in clear and precise



terms, each substantive fact intended to be so relied on." So in this case, if the defendant relied on a failure total or partial of consideration, or that the consideration was illegal, in conflict with public policy or against some special statute, the facts must have been stated, from which the court could determine whether their establishment would constitute a defense or not. But where there is an allegation of no consideration whatever, there is nothing further to be said,—for no amount of circumlocution or multiplication of negative averments could make the defense more specific.

In the case of *Kernodle vs. Hunt*, (4 Blackf., 57,) the first plea was, that the notes sued on were voluntary and without any good or valuable consideration whatever, to which there was a demurrer, and the court say: "The first plea is good, and consequently, the demurrer was correctly overruled. That question is settled in the case of *Huston vs. Williams*, decided by this court at their May term, 1833. In that case it is said, that a plea in averring that a bond is voluntary and without either a good or valuable consideration, is sufficient without any averments more special, because there are no facts more special in such a case to aver. If there was no consideration there is nothing to make averments about. Such a plea however, will not be available on trial, if there was any consideration whatever, no matter how fraudulent, or trifling, that consideration may have been."

In *Coyle's Exec. vs. Foster*, (3 J. J. Marsh., 473,) the plea was, that the note was not executed on a consideration good and valid in law, and the court held this plea insufficient, observing "that a plea that the note was given without any consideration would have been good, but the legal effect of the plea pleaded was, not that there was no consideration or that the note was voluntary, but it is according to any rational construction that there was a consideration in fact, but that this consideration was invalid by operation of law."

These cases were decided under the old system of pleading, but the new system has not changed the meaning and effect of the English language; and if the meaning of a plea

---

St. Louis & Iron M. R. R. Co. v. Silver.

---

that there was no consideration at all, remains now as it was under these decisions, no more specific allegation of a total want of consideration in fact can be averred now than heretofore.

Judgment is reversed and the cause remanded. The other judges concur.

—o—

ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY, Respondent,  
vs. DAVID H. SILVER, Appellant.

1. *Practice, civil—Witnesses—Cross-examination of—How far may be carried.*—If a witness is sworn and gives some evidence, however informal and unimportant, he may be cross-examined in relation to all matters involved in the case.
2. *Practice, Supreme Court—Leading question—Decision of trial court, no ground for reversal.*—The question whether a leading question is permissible in direct examination is one to be decided by the trial court in its sound discretion, and its decision in this regard is not assignable for error in the Supreme Court.

*Appeal from St. Louis Circuit Court.*

*Slayback & Hæussler*, for Appellant.

*Dryden & Dryden*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action on an account stated in the petition. At the trial at Special Term before a jury, a verdict and judgment were rendered for the defendant. On appeal to General Term, the judgment was reversed and the cause remanded for a new trial, from which last judgment defendant appealed to this court.

The first objection urged by the plaintiff to the ruling of the court at Special Term, was its action in allowing defendant, on cross-examination, to interrogate the witness in respect to matters upon which he had not been examined in his direct examination.

In some courts the rule prevails, that in the cross-examination of a witness, he can only be questioned in regard to those points or subjects which are contained in the direct examination; but this court at an early day adopted the English doctrine, to the effect, that if the witness is sworn and gives some evidence, however formal or unimportant, he may then be cross-examined in relation to all matters involved in the case. (Page vs. Kankey, 6 Mo., 433; Brown vs. Burrus, 8 Mo., 26.)

The next error complained of is, that the court trying the cause permitted the counsel for defendant in the direct examination of his own witness to ask him leading questions. The questions were leading and improper; but that alone will not furnish a ground for reversal. Leading questions are sometimes permissible in direct examinations, and whether they are so or not generally rests in the sound discretion of the court trying the case, and its decision in this regard is not assignable for error. (King vs. Mittalberger, 50 Mo., 182, and authorities referred to.)

For this there is an obvious and sufficient reason. The opposite party has the right to cross-examine the witness, and can generally then correct any injury which he has suffered on account of the admission of the leading question.

The court rightly refused the second instruction offered by the plaintiff. It was presented on the assumption, that the evidence given by the first witness, herein referred to, on cross-examination was incompetent testimony, and was intended to destroy the decision of the court by ruling it out. But as we have seen, the objection to that testimony was untenable. The point made, that there was no evidence to support the verdict, is also founded on the idea that that testimony was illegal and inadmissible; but as we are of a contrary opinion, it follows that there was a sufficient evidence to authorize the submission of the case to the jury.

Wherefore it results that the judgment at General Term should be reversed and that at Special Term affirmed. The other judges concur.

HENRY C. LACKLAND, Appellant, vs. ALEX. J. P. GARESCHÉ  
Garnishee of THOMAS F. SMITH, Respondent.

1. *Garnishment—Trust property not subject to.*—The statute touching garnishment is essentially legal and not equitable in its nature and procedure; and the rights, credits and effects in the hands of the garnishee which are subject to attachment are such as are not encumbered with trusts, and such as may be delivered over, or paid to the officer under the direction of the court, free from the encumbrances of a trust.

Where a conveyance in trust is made in fraud of creditors, a different rule prevails, for the instrument being void, the property is subject to attachment under simple law process.

*Appeal from St. Louis Circuit Court.*

*Lackland, Martin & Lackland, and H. C. Lackland, for Appellant.*

According to the trust, "the net proceeds" of the sale belonged to Smith absolutely. The fact that the garnishee held the net income in a fiduciary relation does not exempt him from charge. Under *Curling vs. Hyde*, (10 Mo., 374,) as soon as the court ordered a distribution of the fund held by the administrator, he became liable to garnishment. On this point see also *Wagn. Stat.*, 664, § 3. After return day a sheriff holds the money for plaintiff alone, and may be garnished. (*Marvin vs. Hawley*, 9 Mo., 382.)

*N. Holmes, for Respondent.*

Garnishment in attachment is a proceeding at law, and reaches only to legal property of the defendant, and in the possession of the garnishee as his debtor, commissary or factor. (*Garnishment Act*, §§ 1, 4, 8, 1 *Wagn. Stat.*, 1870, p. 664; *Attachment act*, §§ 18, 19, 23, 1 *Wagn. Stat.*, 1870, p. 184-5; *Skowhegan Bank vs. Farmer*, 46 Me., 293-5; *Parker vs. Esty*, 19 Vt., 131, *Redfield C. J.*; *Staunts vs. Raymond*, 4 Cush., 314; *Pratte vs. Scott*, 19 Mo., 625; *Lee vs. Tabor*, 8 Mo., 322; *Wood vs. Edgar*, 13 Mo., 451.)

The possession of legal property of the defendant, or this legal indebtedness of the garnishee to the defendant, must be also in his individual and personal character, and not in

any representative character (as an administrator, a trustee, a sheriff and the like); and therefore it is, that such representative or official person cannot be garnished, until he has settled a balance, or the return day has come, and he has promised, or become liable personally to pay a given sum to a particular person, (even as the law stood before the recent statute to like effect). (Garnishment Act, § 3, 1 Wagn. Stat., 1870, p. 644; *Matter of How*, 9 Wend., 465, 9; *Brooke vs. Cook*, 8 Mass., 246; *Curling vs. Hyde*, 10 Mo., 376; *Richard vs. Griggs*, 16 Mo., 416; *Marvin vs. Hawley*, 9 Mo., 382.)

It must be such a personal and legal liability as would support an action at law by the defendant himself against the garnishee. (*Reagan vs. Pacific R.*, 21 Mo., 34; *Firebaugh vs. Stone*, 36 Mo., 111; *Weil vs. Tyler*, 38 Mo., 545; *Hoyt vs. Swift*, 13 Vt., 129.)

If this trustee had struck a balance with Thomas F. Smith, and found a certain sum due at a given date, and promised to pay, or became legally liable to pay that sum, then he might have been garnished for it; as was held in *Nelson vs. Howard*, 5 Md., 131; *Cootrey vs. Leister*, 12 Md., 124, but no such balance had been ascertained.

Purely equitable property, or equitable interests or estates, are not subject to garnishment under the statutes. (§ 18, 1 Wagn. Stat., p. 184.) The execution act (§ 16, 1 Wagn. Stat., p. 605,) provides, indeed, that "all real estate whereof the defendant, or any person for his use, was seized in law or equity," shall be "liable to be seized and sold upon attachment and execution," but this evidently refers only to the levy of the execution which is issued against the defendant in the attachment suit, and not to any process of garnishment. Garnishment under statute is a proceeding at law, not a proceeding in equity, and a purely equitable jurisdiction cannot be drawn into a court of law, in such a proceeding, to confound the distinct jurisdictions. (*Van Winkle vs. McKee*, 7 Mo., 437; *Clark vs. Henry*, 9 Mo., 339; *Withers vs. Shropshire*, 15 Mo., 631; *Barnham vs. Hopkins*, 17 N. H., 259;

Hoyt vs. Swift, 13 Vt., 129; Harrell vs. Whitman, 19 Ala., 135, 9; May vs. Baker, 15 Ill., 89; Perry vs. Thornton, 7 R. L., 15; Clarke vs. Farnum, 7 R. S., 174; Plunket vs. Huray, 4 Harring., 436; Johns vs. Thomas, 5 Harring., 419.)

ADAMS, Judge, delivered the opinion of the court.

This was an action by attachment, brought by the plaintiff against Thomas F. Smith, as a non-resident of this State, in which the defendant, Garesche, was summoned as garnishee. No other property or effects of the defendant, Smith, were attached, except such as were alleged to be held by the garnishee, Garesche, as trustee for the use of Smith. The property held in trust by Garesche consisted of several houses and lots in the city of St. Louis. The only interest to which Smith was entitled was the right, under certain terms and conditions, to receive the net income, during his life, arising from the rents and profits after payment of all expenses, such as taxes, insurance, repairs, etc. The nature and terms of the trust are manifested by a deed of conveyance, under which Garesche holds the title. According to a power in the original conveyance, Garesche had been substituted as the trustee in place of a prior trustee. For a full statement of the trusts of this conveyance, reference is made to the case of McIlvaine vs. Smith, *et al.* (42 Mo. 45); where it was held by this court that Smith had no interest in the realty, subject to sale under execution.

One of the issues raised by the pleadings was, that the conveyance under which Garesche held the trust property, was fraudulent and void as to the creditors of Smith; but this issue was entirely ignored at the trial. It was not referred to, nor was any attempt made at all, to attack the deed as being fraudulent as to creditors, and therefore, we shall treat this case as though no such issue was in it. Under this view, it was simply an attempt to draw an exclusive equity jurisdiction into a court of law, by means of the statutory process of garnishment in attachment suits. The court undertook to call a trustee of a pure express trust to account, and to enforce



the performance of his duties as trustee in a trial of an issue at law, by a jury, or by the court sitting as a jury, and proceeded to examine into the state of his accounts, so far as to ascertain, as the record shows, that the trustee was accountable at least for a sum larger than the plaintiff's demand, which had been reduced to a special judgment, in the attachment suit, and then ordered the amount of that judgment to be paid to the plaintiff by the garnishee. And as the garnishee failed to comply with this order, the court declared him a debtor of the plaintiff, and rendered a judgment against him, as upon a legal indebtedness due from him to defendant, Smith, and without any attempt to have a full and complete account taken and stated of the trust matters.

Although our code of practice has abolished all distinctions in the forms of actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs, the line of demarkation between legal and equitable cases is still preserved and fully maintained by the Code. The pleadings develop the nature of the case, whether legal or equitable, and as thus presented, the court proceeds to hear and determine it, either as a court of law or of equity, according to the pleadings. The remedy by attachment for the collection of debts in this State, is essentially legal, and not equitable, in its nature and procedure. It is founded alone upon statutory law, and with few modifications, has been in existence as long as the State itself. It was in full force when the present code of practice was adopted, and it is safe to say that it has not been changed or essentially modified by that code. The whole tenor and scope of our attachment laws, so far as garnishees are concerned, indicate that they are intended to operate on legal property rights and effects of the debtor in the hands of the garnishee. The service of the garnishment operates as an attachment of such property in his hands. (1 Wagn. Stat., 184-5, §§ 18, 19, 23, and 664, §§ 1, 4, 7, 8.)

The issues on the answer of the garnishee are to be tried as ordinary issues between plaintiff and defendant. (1 Wagn. Stat., 666, 667, § 17). If it appear upon the trial that the gar-

nishee is possessed of property, effects or money of the defendant, the court or jury must find what property, etc., and the value thereof, and he may discharge himself by paying or delivering over the same to the proper officer under the order of the court, etc. (1 Wagn. Stat., 667, § 18). These provisions demonstrate that the rights, credits, and effects in the hands of the garnishee, are such as are not incumbered with trusts, and such as may be delivered over or paid to the officer under the direction of the court, free from the embarrassment of a trust. It must be borne in mind that this was a continuing express trust, to last at least for the life-time of the beneficiary, which has been drawn into a court of law, by way of garnishment, to compel the trustee to execute the trust in favor of a creditor of the beneficiary. In my judgment, it was not contemplated by the legislature to authorize a court of law, in a mere side issue growing out of an attachment suit, to exercise the intricate and complicated duties of a chancellor in the enforcement of purely equitable trusts. It is competent, under our statute, to summon a fraudulent assignee of property and effects, and compel him to disgorge in favor of a creditor. For when such issue is found in favor of the creditor, no trust exists, and the property or effects can be delivered over without any trouble, to satisfy the debt. So if there has been a settlement between a trustee of an express trust and his beneficiary, and a balance found to be due upon such settlement, it becomes a debt at law, and may be garnisheed. But nothing of that kind appears in this case. We do not say that the plaintiff is without remedy. (Pendleton vs. Perkins, 49 Mo., 565.) What we decide is, that if this trust was not fraudulent as to the creditors of Smith, the plaintiff has mistaken his remedy.

The judgment at General Term is affirmed. The other judges concur.

---

 Barker v. Scudder.
 

---

WILLIAM S. BARKER, Respondent, vs. WILLIAM H. SCUDDER,  
Appellant.

1. *Statute of frauds—Verbal agreement, when not within.*—The question whether or not a verbal contract comes within the statute of frauds, depends wholly upon the agreement. If the party agrees to be originally bound, the contract need not be in writing, but if his agreement is collateral to that of the principal contractor, or is that of a guarantor or a surety for another, then the agreement must be in writing.
2. *Guaranty, verbal—What necessary to constitute.*—To constitute a verbal guaranty or personal undertaking, it is unnecessary that the word "guaranty" should be used. But is sufficient if, in view of all the circumstances attending the transaction, the ingredients necessary to constitute such a guaranty, viz.: the intention of the one party that his affirmation should operate as an inducement to the other party to buy or receive the thing, and the acceptance of a reliance upon such inducement by the latter, be shown to exist.
3. *Guaranty—Notice of non-payment—Unnecessary, when.*—Where one knowing of the existence of certain notes personally guarantees their payment, notice of non-collection is not necessary in order to bind him. The extent of his obligations in such case is not within the peculiar knowledge of the opposite party, so that information touching the same ought to be communicated to him; but he has the means of knowledge at his own command.

*Appeal from St. Louis Circuit Court.*

*John W. Noble*, for Appellant.

I. Notice should have been averred and proved. (Lewis vs. Bradley, 2 Ired., 305; Herring's case, Cro. Jac. 432, 2 Saund., 62; Rex vs. Holland, 5 Tenn., 62; Spooner vs. Baxter, 16 Pick, 419; Greece vs. Ricks, 3 Dev., 362; Adcock v. Fleming, 2 Dev. & Bat., 470; Lewis vs. Brewster, 2 McLean, 31; Sage vs. Wilcox, 6 Conn. 31; Rankin vs. Childs, 9 Mo., 674.)

*Hamilton & Musser*, for Respondent

I. Notice of non-payment was not necessary. (2 Am. Lead. Cas. 60, 133; Stern vs. Marks, 35 Barb., 565; Lampherd vs. Cowan, 42 Verm., 175; James vs. Scott, 59 Pa. St., 182; 2 Am. Lead. Cases, [5th. Ed.] 59; Vinal vs. Richardson, 13 Allen, 527; Montgomery vs. Kellops, 43 Miss. 496; Hall vs. Rogers, 7 Humph., 541; Craig vs. Parker, 40 N. Y., 181.)

WAGNER, Judge, delivered the opinion of the court.

This was an action on a verbal guaranty. The petition set forth that plaintiff sold defendant a certain lot of ground in consideration that defendant would pay off and discharge an encumbrance on the same for \$5,000, and pay plaintiff a further sum of \$5,000; that defendant paid plaintiff \$241 in cash, and for the balance of the \$5,000 delivered two certain notes of Barton Able, indorsed by Dan. Able, each for \$2,379.50, at sixty and ninety days, which notes defendant then and there guaranteed and promised the plaintiff would be paid at the times they fell due respectively, or, if not paid at maturity, could be collected in full of said Ables by legal process; that plaintiff relied on said assurance and guaranty of the defendant, that the same would be paid by said Ables at maturity, or could be collected from them by process of law; that the notes were not paid; that the Ables, at maturity of said notes, were insolvent, and continue so; that suits were commenced at terms of the court next following maturity, judgments obtained and writs of execution returned unsatisfied, of all which defendant then and there had notice, and the prayer is for judgment for the amount of the notes, interest and costs.

The answer denied all the material averments in the petition, and also pleaded the statute of frauds.

The trial was before the court sitting as a jury, and there was a great deal of conflicting testimony introduced in reference to the agreement of the parties, as to how or under what circumstances the notes were received by the plaintiff. At the request of both parties, the court made a special finding of facts. The finding was that the defendant agreed with the plaintiff to assume and pay, as part of the consideration and purchase money, for the lot sold and conveyed to him (and which he did subsequently pay off), an incumbrance of \$5,000 existing on said lot; that in addition thereto, and for the balance of said purchase money, defendant agreed to pay plaintiff the sum of \$5,000; that the defendant paid to plaintiff, in money, or his check therefor, the sum of \$241,

and for the balance of said \$5,000 delivered to said plaintiff the two notes, mentioned in the petition, dated October 17, 1868, made by Barton Able, payable to the order of Daniel Able, and indorsed by the latter, each for the sum of \$2,379.50, payable respectively at sixty and ninety days after date, with interest at six per cent. per annum from date; that for the purpose of inducing the plaintiff to take the said notes on account of the said purchase money, the defendant promised and assured the plaintiff that the same would be paid when they fell due, and, if not paid, they could be collected by plaintiff of said Ables; that in taking said notes on account of said purchase money the plaintiff relied upon the said assurance and promise of the defendant; that the said notes above described were the only ones that were ever delivered or came to the possession of the plaintiff; and to which alone the said oral guaranty applied; that said notes not being paid at maturity, were duly protested for non-payment, and notice of the non-payment and protest of the first falling due was immediately thereafter given by plaintiff to defendant, but no notice was given of the non-payment or protest of the second of the said notes, nor was any notice given to the defendant of the result of the suits next hereinafter mentioned; that suits were instituted by the plaintiff on the said two notes against the said Ables at the term of the St. Louis Circuit Court next succeeding the respective maturity thereof, which suits were diligently prosecuted to final judgment, on which judgments executions were duly issued to the sheriff of the county of St. Louis, returnable to the term of the said court next succeeding said judgments, which executions were duly returned by the said sheriff *nulla bona*, and said notes still remain wholly due and unpaid; that the said Ables, at the maturity of said notes, were insolvent, and have ever since continued to be insolvent; and the plaintiff in court tenders to the defendant assignments of the said judgments. The court therefore found the issues for the plaintiff, and declared the law accordingly, and gave judgment for the amount of the principal and interest of the notes so found to be guaranteed.

The finding of the facts made by the court must be regarded here as the special verdict of a jury, and the question we are to determine is whether the court correctly declared the law as applicable to those facts.

The statute of frauds, though relied on in the answer and saved in the case, was not much insisted upon in the argument. According to the agreement of the parties at the time the contract was entered into, as found by the court, there was no necessity for reducing it to writing, in order to render it valid. The question whether a verbal contract comes within the statute of frauds or not, depends wholly upon the agreement. If the party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of the principal contractor, or is that of a guarantor or a surety for another, then the agreement must be in writing. (Glenn vs. Lehnem, 54 Mo. 45; Kratz vs. Stock, 42 Mo., 35; Besshears vs. Rowe, 46 Mo., 501.)

The agreement in the present case was to pay the debt of the defendant himself and not the obligation of the Ables. The substantial and meritorious consideration for defendant's promise was the deed from the plaintiff, out of which defendant's liability accrued. We, therefore think that the statute of frauds does not apply, and that no writing was necessary to support the promise.

It is objected here that the court improperly excluded evidence offered by the defendant to show what was the actual value of the lot. But in this ruling there was no error. The parties had agreed upon a certain price, and the question as to whether it was too much or too little was not in the case. The real point was as to whether there was an agreement, as alleged in the petition, and whether there was a guarantee on the part of the defendant that the notes on the Ables should be paid.

To constitute a verbal guaranty or personal undertaking it is not necessary that the word "guaranty" should be used; but it is sufficient if, in view of all the circumstances attending the transaction, the necessary ingredients to constitute



such a guaranty, namely: the intention of the one party that his affirmation should operate as an inducement to the other party to buy or receive the thing, and the acceptance of, and reliance upon such inducement by the latter be shown to exist (*Edwards vs. Marcy*, 2 Allen, 490; *Carter vs. Black*, 46 Mo., 384). Now, the finding of the court was, that, for the purpose of inducing the plaintiff to take the notes on account of the purchase money, the defendant promised and assured him that the same would be paid when they fell due, and if not paid then they could be collected of the Ables; and that in taking the notes the plaintiff relied upon the assurances and promise of the defendant. This certainly was all that was necessary to fix the defendant's liability.

The only remaining question to be considered is whether the plaintiff's failure to give notice that the notes were not collected impairs his rights in the present action. In this State the law is well established that where an offer or proposal is made to guaranty the payment of future advances to be made to the principal of the guarantor, there should be a distinct notice of acceptance in order that the guarantor may know his liability, and have the means of arranging his relations with his principal, and may take from him security or indemnity. (*Central Sav. Bank vs. Shine*, 48 Mo., 456; *Smith vs. Anthony*, 5 Mo., 504; *Rankin vs. Childs*, 9 Mo., 665.) But there is an obvious distinction between an overture or proposition to guaranty, and a simple contract to be directly liable. The reason for the rule which requires notice is that the guarantor may know distinctly his liability, and be enabled to arrange his relations with the party in whose favor the guaranty is given. If he makes a proposition for an advancement he should be informed of its acceptance, but where he directly agrees and binds himself to be answerable for a specific sum under certain designated circumstances, he knows and has the means within his own hands of determining the extent of his obligations. In *Vyze vs. Wakefield*, (6 M. and W., 442), where this subject was thoroughly discussed, Lord Abinger sums up the rule as extracted and deduced from the

---

State, ex rel., v. City of St. Louis, et al.

---

authorities thus: "The rule to be collected from the cases seems to be this, that when a party stipulates to do a certain thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to notice unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." This interpretation of the cases on the subject seems to be entirely sensible and satisfactory. The question now is, under which branch of this proposition does the case at the bar fall? The defendant knew of the existence of the notes, and he had personally guaranteed their payment or collectibility. Should they not be paid or be incapable of being collected, then he was individually responsible. He was aware of every ingredient in regard to the matter, and it was his duty to be advised of everything relating to their condition. No notice was therefore required, but it was incumbent on him to know whether they were paid, and the contract that he entered into complied with.

I am of the opinion that the judgment should be affirmed; the other judges concur.

— 0 —

STATE OF MISSOURI, *ex rel.*, JOHN S. CAVENDER, Appellant, *vs.*  
THE CITY OF ST. LOUIS, *et al.*, Respondents.

1. *St. Louis—Sewer—Route of in district—Need not be determined by ordinance.*  
—Under § 12, Art. VIII. of the charter of the City of St. Louis, of 1870, the City Council must establish the sewer districts by ordinance. But it need not pass another and special ordinance to determine the particular route, or dimensions or material or laterals of the sewer within the district. These details may be determined by ordinance, or be entrusted to the engineer to be regulated by contract.
2. *St. Louis—Sewer—Plans and profiles—To be submitted to the City Council, when.*—The plans, profiles and estimates mentioned in § 17, Art. VIII of the St. Louis charter of 1870, are required to be prepared and submitted to the City Council, only in cases where the work is done by the city, and paid for by appropriations out of the city treasury.

---

State, ex rel., v. City of St. Louis, et al.

---

*Appeal from St. Louis Circuit Court.**S. A. Holmes*, for Appellant.

I. Ordinance No. 7550 establishes a sewer district, but no sewers in the district; and it purports to delegate to the city engineer the power to determine how many sewers there shall be, and where the same shall be located. (Sess. Acts 1870, Art. VIII, § 12, p. 480; *Ruggles vs. Collier*, 43 Mo., 353; also Sess. Acts 1870, Art. III, § 1, pp. 463 and 464, subd. 6; *Murphy vs. Clemens*, 43 Mo. 395.)

II. There was no compliance with the requirements of § 17, Art. VIII, of the act above cited. No plans, profiles or estimates of the cost of any sewers were ever submitted by the city engineer to the council. There could be no valid contract without such submission. (State, *ex rel.*, *Dunn vs. Barlow*, 48 Mo. 17.)

*Sharp & Broadhead*, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

This was a petition for a writ of certiorari to bring up the record of the proceedings of the city of St. Louis and its officers, in the matter of the establishment and construction of sewers in Compton Avenue sewer district No. 10, and the assessment of a special tax against the relator and his property for the payment of the cost of such construction. It is alleged in the petition that the proceedings on the part of the city and its officers are illegal; because, first, no ordinance was ever passed by the city council, establishing and locating any sewers in the said Compton avenue sewer district, as required by the twelfth section of the eighth article of the present city charter; secondly, because the city engineer did not at any time prepare and submit to the city council any plans, profiles or estimates of the cost of any district sewers to be constructed in said sewer district according to section 17 of the 8th article of the same act; and, thirdly, because ordinance numbered 7550, by the supposed authority of which the sewers were constructed, did not have any indorsement

by the city engineer of any estimate of the whole cost of any sewers proposed to be constructed in said district, as required by the 18th section of the same article of the charter.

It was further averred that the acts of the city in the premises, and of the city engineer in making the contract for the work, the assessment of the tax, and issuance of the bill against the relator and his property, were without authority of law, and void. Upon the facts stated, the Circuit Court awarded the writ, which was duly served, and the respondents, instead of making a return thereto, moved to quash the writ and dismiss the petition, which motion was sustained, and the case is now brought here upon the sufficiency of the petition to justify the writ. The motion to quash may be regarded as a demurrer to the petition, and the only question, therefore, is whether the petition showed that the plaintiff was entitled to any relief.

The ordinance under which the work was done defined the limits of the sewer district, and then provided that the city engineer should cause district sewers to be constructed within the said district, with all the lateral sewers, inlets and other appurtenances necessary to render said sewers complete and efficient. The main sewer was required to be thirty inches in mean diameter, and to be made of brick, and laid in hydraulic cement mortar, and the lateral sewers for inlets were to be made of sewer pipe fifteen inches in diameter. Provision was then made for charging the cost of the construction of the sewers as a lien upon the property-holders in the district.

Section 12 of article 8, referred to in the petition, (Acts 1870, p. 480) reads as follows: "District sewers are payable by property owners, and shall be established within the limits of districts to be prescribed by ordinance; connecting with a public sewer, district sewers, or some natural course of drainage. Such district may be sub-divided, enlarged, or changed by ordinance at any time previous to the construction of the sewer therein. The city council shall cause sewers to be constructed in any district, whenever a majority of the

property-holders resident therein shall petition therefor, or whenever the city council may deem it necessary for sanitary or other purposes, and the character, dimensions and material of such sewers shall be prescribed by ordinance or contract, and may be changed, diminished, enlarged or extended by ordinance, and shall have all the requisite laterals, inlets, and other appurtenances. As soon as a district sewer is fully completed, the city engineer shall compute the whole cost thereof, and shall assess it as a special tax against all the lots of ground in the district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highways, and said officer shall make a certified bill of such assessment against each lot in the district, in the name of the owner thereof, which shall be collected and paid in the manner hereinafter prescribed; provided that the repairs and other incidental expenses of district sewers shall be paid out of the general revenue."

Section 17, referred to, declares: "The council shall have no power directly to contract for any public work, or improvements or repairs thereof, contemplated by this charter, nor to fix the price or rate thereof; but the city engineer shall in all cases, except in cases of necessary repairs, prepare and submit to the council plans, profiles and estimates of cost of any proposed work, and, under the direction of the ordinance, shall advertise for bids, and let out said work by contract to the lowest and best bidder, subject to the approval of the council. Any other mode of letting out work shall be held as illegal and void."

And the next succeeding (18th) section provides: "Every ordinance requiring such work to be done, shall contain a specific appropriation from the proper revenue or fund, based upon an estimate of the cost, to be indorsed by the engineer on said ordinance, for the whole of the cost of each street, part of street, or other object respectively, and every contract shall contain a clause to the effect that it is subject to the provisions of the charter, that the aggregate payments thereon

shall be limited by the amount of such specified appropriation, and that on ten days' notice the work on said contract may, without cost to, or claim against the city, be suspended by the city engineer with the approval of the mayor, for want of means, or other substantial cause." \* \* \*

To reverse the judgment of the court below, the appellant relies on the principles of law laid down in the cases of *Ruggles vs. Collier*, (43 Mo. 375) and *Murphy vs. Clemens*, (*Id.* 395). But after these decisions, the charter of the city was amended, and the provisions upon which those cases were decided, have been materially altered. The charters of 1866 and 1867 required that the dimensions, etc., of the sewers should be prescribed by ordinance. But the charter in this respect was changed in 1870, and now provides that they shall be prescribed by ordinance or contract. The council must establish the district by ordinance, but how or where the sewer shall be constructed, the dimensions and materials may be either prescribed by ordinance, or it may be agreed upon and stipulated in the contract, under the direction of the city engineer, who makes it on the part of the city, and which, before it becomes binding and effective, has to be approved by the city council. The twelfth section, after declaring that district sewers shall be established within the limits of the districts to be prescribed by ordinance, expressly confers the power on the city council, to cause sewers to be constructed, and leaves the character, dimensions and materials to be determined either by ordinance or contract. Under the foregoing provision, the ordinance requiring the construction of sewers may be general in its character, and the matter of details may be intrusted to the engineer, to be regulated by contract. It was not intended that when a sewer district was established, it should be necessary to pass a special ordinance to authorize the construction of each lateral sewer.

Section 17 will not bear the construction placed upon it by the appellant. The plans, profiles and estimates there mentioned, are only required where the work is done by the city, and paid for by appropriations out of the city treasury. This



---

Estel, et al. v. St. Louis & Southeastern R. R. Co.

---

is evidently shown by the 18th section, which directly refers to the preceding section, and says that every ordinance requiring such work to be done, shall contain a specific appropriation from the proper revenue or fund, and provision is then made for stopping or suspending the work for want of means. This part of the charter has no application whatever to work done or carried on at the expense of the property-holder.

I see no error in the action of the Circuit Court, and its judgment must be affirmed. The other judges concur.

—o—

EMANUEL ESTEL, *et al.*, Respondents, *vs.* ST. LOUIS & SOUTHEASTERN RAILROAD COMPANY, Appellant.

1. *Practitioner, civil—Jury—Verdict—Supreme Court*.—In civil law cases the Supreme Court will not disturb verdict of jury on questions of conflicting testimony.
2. *Waiver*.—Although in an agreement time is made of the essence of contract, still it may be waived by a subsequent understanding between the parties.
3. *Engineer*.—Is sole judge, of what.

*Appeal from St. Louis Circuit Court.*

*Bereman & Smith*, for Appellants.

*Van Waggoner & Dickson*, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by plaintiffs as surviving partners of the firm of M. P. Gordon, & Co., to recover a balance of which it was alleged was due them for furnishing and delivering cross-ties to defendant.

The petition contained two counts. The first was based on a written contract entered into between the plaintiffs and defendant, bearing date April 30th, 1870, by which plaintiffs agreed to deliver 20,000 railroad cross-ties to defendant, for which they were to be paid sixty cents each; fifty-five cents a tie as they were delivered, and the additional five cents when the whole number was furnished. The petition then averred a complete fulfillment of the agreement in every respect, and claimed that a balance was still due and unpaid.

---

Estel, et al. v. St. Louis & Southeastern R. R. Co.

---

The second count charged another contract between the same parties to furnish an additional quantity of ties at the same price, and alleged the delivery of a certain number, for which no payment had been made.

The answer denied that plaintiffs complied with the contract stated in the first count. It alleged that the time of the delivery of the ties, which in the written agreement was fixed at Aug. 1st, 1870, was extended to Sept. 1st, 1870, and that time was made the essence of the contract; that the chief engineer of the defendant was by the terms thereof, the sole and final judge of the quality, character, value and number of such ties as should be furnished by the plaintiffs, and that payment therefor was to be made only on his certificate, and that the chief engineer had not certified that the 20,000 ties were delivered, and that they were not furnished and delivered within the specified time.

The answer to the second count denied the agreement, and denied that any ties were furnished under it, and averred that they were all delivered under the first contract; and charged that full payment had been made.

There was a replication filed in which it was alleged, that the chief engineer refused to certify for the ties that were furnished and delivered, and the payment set up in the answer was denied.

The trial was before the court and a jury, and a verdict was found on each count for the plaintiffs. The contract referred to in the first count of the petition, and under which the first ties were delivered, provided that the chief engineer of the defendant should make, or cause to be made, an inspection of each and every lot of cross-ties delivered under the agreement, and should give a certificate setting forth the number and value of such cross-ties; whereupon the plaintiffs should be entitled to demand and receive the sum of fifty-five cents for each and every tie so delivered, which amount should be paid by the defendant within ten days after such inspection and certificate. Upon the delivery and acceptance of the whole number of the cross-ties named in the agreement, then

---

Estel, et al. v. St. Louis & Southeastern R. R. Co.

---

the plaintiffs were to be entitled to demand and receive upon the certificate of the engineer an additional sum of five cents each for the 20,000 cross-ties, it being understood that the five cents named, should be withheld during the delivery of the ties, as a forfeiture for the fulfillment of the delivery of the whole number. And it was further mutually agreed and understood between the parties, that the chief engineer should be the sole judge as to where the ties were to be delivered, and that time should be counted as an element in the agreement.

The time originally designated for delivering the ties and completing the contract was August 1st, 1870, but this time was extended in writing till the first of Sept. 1870. Owing however to the low stage of the water and the difficulty of shipping the ties, they were not all delivered till some time after the date last specified, but they were received by the defendant without objection and used; and the evidence shows that the work of laying the track was not delayed by reason of the failure to deliver at the time agreed upon. It does not appear that the engineer ever inspected the ties. He employed an assistant who counted them. But he says in his testimony that he does not know whether the 20,000 were furnished under the first contract or not; but that he made out a voucher for them for the lowest price, that is fifty-five cents, five cents less than if they had been delivered according to the time stipulated in the agreement.

There was a great deal of oral evidence introduced in regard to the time the ties were delivered under the respective contracts, and the number that was delivered. The jury were the proper judges of the credit to be given to this evidence, and by their verdict they found in favor of the plaintiff, and this is conclusive on us as to all questions of fact. It is admitted that the defendant paid plaintiffs fifty-five cents a piece for the ties furnished, and the matter in dispute relates to the five cents additional to which plaintiffs were entitled, provided they complied with the terms of the agreement. Upon this question the court gave the following de-

---

Estel, et al. v. St. Louis & Southeastern R. R. Co.

---

claration: "The court instructs the jury that if they find from the evidence, that the plaintiffs failed to deliver the 20,000 ties sued for in the first count of the petition, within the time limited in the contract sued upon, and the extension thereof; and that defendant did not waive the condition of the contract as to the time of delivery, or did not ratify the acceptance of said ties after the time for the delivery thereof had expired, then the plaintiffs are not entitled to receive more than fifty-five cents each for the number of ties delivered to and accepted by defendant under said contract; and if the jury further find from the evidence, that plaintiffs have been paid by defendant at the rate of fifty-five cents for the whole number of ties so delivered and accepted under said contract, then the plaintiffs are not entitled to recover in the action in the first count of the petition."

We think the instruction is unobjectionable. It carries out in full force the conditions of the contract, and precludes a recovery for more than fifty-five cents for each tie, unless the defendant waived the condition as to time, and accepted the ties under the waiver. There was abundant evidence to support this theory of the case. It was shown by plaintiffs' witnesses that when the difficulty occurred in obtaining transportation, the plaintiffs were informed by the defendant that it would make no difference, that they might deliver the ties as fast as possible and it would be all right; that they were delivered in time to be used, and that they were accepted without any objection being raised as to time. There is very little dispute here in reference to the quality of the ties; and as to the few that were rejected, the court gave the defendant's own instruction that they were not to be taken into consideration by the jury.

Any decision that the engineer would make respecting the quality of the ties would be conclusive and bind the plaintiffs, for the matter was submitted to his arbitrament, but not so as to quantity. The question of numbers may well be decided by the jury, and if the company waived the condition as to time, that would modify the contract in respect to the en-

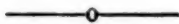
---

Carlin v. Cavender.

---

gineer's certificate of non-compliance in that regard. This is really the only point in the case deserving any attention. The three instructions given at defendant's request were all that could be asked in reference to the parties to the agreement, and the ties rejected, and to payment for the ties in the second count. And those refused were in conflict with the instruction given by the court, first herein alluded to.

I am of the opinion that the judgment should be affirmed. All the judges concur.



JAMES T. CARLIN, Respondent, vs. JNO. S. CAVENDER, Appellant.

1. *Street improvement—Ordinance in relation to—Specification as to time when work is to be done.*—An ordinance authorizing the city engineer of the city of St. Louis to improve certain streets is not rendered invalid by reason of its failure to specify the time within which the work shall be done.
2. *Engineer—Special tax bill—Judgment in case of, should be special against property.*—In suit on a special tax bill for street improvements no general or personal judgment against the defendant can be rendered. The judgment should be a special one against the property.

*Appeal from St. Louis Circuit Court.*

*S. A. Holmes*, for Appellant.

None of the ordinances specify the time in which the work is to be done, or its dimensions or material.

No plans or estimates of the work were prepared by the city engineer, nor were any such plans submitted to or approved by the council. Unless this is done, the statute expressly declares that the contract shall not be valid. (Sess. Acts 1867, Art. 6, § 16, p. 69; State *ex rel.*, Dunn vs. Barlow, 48 Mo., 17.)

The judgment given is clearly not authorized. It is a general judgment against the defendant, instead of the property which the statute charges with the lien. (Neenan vs. Smith, 50 Mo., 525; City to use, &c., vs. Allen, 53 Mo., 44.) The

approval of both the plans and contract by the City Council is a condition precedent to the validity of the contract. (State *ex rel.*, Dunn vs. Barlow, 48 Mo., 17; Ruggles vs. Collier, 43 Mo., 375; Murphy vs. Clemens, *Ibid*, 395; 1 Dillon Mun. Corp., §§ 373, 55, 62; 2 Dillon Mun. Corp., §§ 469, 470; Mayor &c., vs. Reynolds, 20 Md., 1, 12, 13, 14; Zottman vs. San Francisco, 20 Cal., 96; Cowell vs. Martin, 43 Cal., 605; Hewes vs. Reis, 40 Cal., 255; Pavement Co. vs. Painter, 35 Cal., 699; Hoyt vs. East Saginaw, 19 Mich., 44.)

*T. Grace*, for Respondent.

I. The ordinance instructs the engineer to cause the work to be done, and that means to do it at once, or immediately. (Revised Ordinances of 1866, p. 321, § 1.)

It also prescribes the extent and dimensions of street that should be improved, to-wit: The whole street from Compton to Ware Avenue.

It was not necessary that the ordinance should recite the width of the street.

The material and manner of doing the work was sufficiently provided for by the general ordinance. This whole subject has been already sufficiently discussed and passed upon in this court. (Sheehan vs. Gleeson, 46 Mo., 100; see also Revised Ordinances, 1866, p. 327, §§ 13, 14; p. 329, §§ 25, 26.)

It was unnecessary that the engineer should make an estimate of the cost of the whole work to be done, and that such estimate should be approved by the City Council. Under the amended City charter the engineer is required to submit the plans and contracts to the city council for approval. But the estimate is not required to be submitted

WAGNER, Judge, delivered the opinion of the court.

This was an action on a special tax bill issued by the city engineer of the city of St. Louis, to defray the cost of improving Lucas Avenue in front of the property of the defendant. Two objections were made in the answer; first, that the special ordinance numbered 6540, which directed the work to



be done was invalid ; and, secondly, that the work was done by the plaintiff after the date fixed by the contract for its completion.

Ordinance 6540, ordering the work to be done, authorized the city engineer to cause Lucas Avenue from Compton Avenue to Ware Avenue to be graded, curbed, guttered, macadamized and the cross-walks and the side-walks to be paved. When this ordinance was passed, the charter gave the City Council "power to cause the construction, reconstruction and repairs of all streets, alleys and public highways within the city at such time and to such extent and of such dimensions and material, and in such manner and under such general regulations, as shall be provided by ordinance." (Sess. Acts 1867, p. 73, § 9.) At the time the work was let out and the contract was performed, there was a general ordinance prescribing the size and character of the materials and the kind of materials to be used, and there is no point made in that respect, but the question is now raised that the time, extent and dimensions of the work are nowhere prescribed or fixed by the ordinance.

So far as the time is concerned in which the work was to be done, we think the ordinance is sufficiently explicit. The engineer is authorized and instructed to cause the work to be done. This conferred on him a present authority. By no fair construction is there any requirement for stating the precise day when the work should be commenced, or within what period it should be finished.

The extent is clearly designated. It is to improve the entire street, from Compton Avenue to Ware Avenue, and the dimensions and materials are prescribed in the amendatory ordinance 6962, which declares that the material to be used for the curbing, guttering, macadamizing and cross-walks shall be of good sound limestone, and such as the vicinity of the city of St. Louis produces, and the side-walks shall be paved with good, hard-burned, red brick, commonly called paving brick ; and they are also prescribed in the general ordinance in reference to the engineer department, which sets

out the size and dimensions of the material, and the manner in which it shall be laid down and used. A fair and just construction of the ordinances and charter fully warranted the action of the city and its officers.

There is obviously no merit in the point that the work was not completed within the time limited by the contract. There is nothing to show that time was of the essence of the contract. For prudential reasons the engineer suspended the work for a time and the contractors assented to that suspension, but when it was deemed advisable to proceed the work was then completed and received. It does not appear that the defendant suffered any injury by the delay. The trial seems to have been in all things fair and unexceptionable, but there is an error in the judgment.

The court rendered a personal judgment against the defendant and also a special judgment against the property. Under the decisions of this court no general or personal judgment could be rendered, and that part of the judgment therefore will be reversed and the special judgment will be affirmed. The other judges concur.

—o—

FREDERICK W. HENSCHEN, *et al.*, Respondents, *vs.* JOHN T. O'BANNON, Appellant.

1. *Practice, civil—Instructions, should cover the whole case.*—Instructions should be founded upon all the evidence and take in the whole case; but a judgment will not be reversed because one is technically erroneous, provided the instructions given, taken together, fairly present the law on both sides of the case and in a manner not likely to mislead.
2. *Practice, civil—Instructions.*—The giving of inconsistent instructions is error.

*Appeal from St. Louis Circuit Court.*

C. M. Napton, for Appellant.

Lubke & Player, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs, who were millers and flour merchants, brought their action to recover of defendant the price of twenty-five barrels of flour, which they sold to him on the 28th day of December, 1867. Defendant by an amended answer pleaded a discharge in bankruptcy, to which plaintiffs replied that the debt sued for was fraudulently contracted by defendant, and was therefore excepted from the discharge pleaded in the answer. Upon this issue there was a trial before a jury and a verdict was rendered for the plaintiffs, and the cause has been brought here for review by appeal.

There was evidence tending to show that on the 28th day of December, 1867, defendant called on plaintiffs at their store and wanted to buy the flour; that defendant represented to plaintiffs that he had money in bank, and that it was then late in the afternoon of Saturday, and that he would give them a check for the bill on Monday morning following; that he wanted the flour to fill an order, and requested plaintiffs to send the same to a steamboat lying at the wharf; that plaintiffs, believing defendant's statement about his having money in bank to pay with, shipped the flour and sent defendant the dray ticket, and on Monday sent for the money, but defendant was not to be found, and they never received any part of the money for the flour. It appeared also that when these representations were made, defendant had no money in bank, or anywhere else; that he shipped the flour, and drew against the shipment, and received the money and used it for his private purposes. On the 18th of January, 1868, defendant filed a voluntary petition in bankruptcy, in which he was afterwards discharged.

Three instructions were given at the trial, one for the plaintiffs, and two for the defendant; for the plaintiffs the court instructed the jury that if they believed from the evidence that defendant, at the time when he purchased the flour in controversy from plaintiffs, represented to them that he had money in bank, and that thereupon the plaintiffs, upon the faith of such statements, sold and delivered the flour, and

that the representation by defendant, that he had money in the bank, was a material inducement to plaintiffs to make such sale, and was false and known to be false by the defendant, then they should find that the debt sued for was created by the fraud of the defendant, and they should find for the plaintiffs.

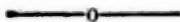
For the defendant the court instructed the jury, first, that fraud was not presumed in law, but must be shown affirmatively; that the burden of proof was on the plaintiffs, and to entitle them to recover in the case, they must establish to the satisfaction of the jury that defendant, at the time he purchased the flour, intended to defraud plaintiffs. Second, that defendant's discharge in bankruptcy released him from the debt sued on, unless said debt was contracted by fraud, and they were instructed to find for the defendant unless plaintiffs had satisfied them by a preponderance of testimony that he bought the flour, intending at the time not to pay for the same, according to the agreement between the parties.

The only ground of objection now raised in this court is, that there was error in giving plaintiff's instruction. The instruction taken by itself is obviously bad. We have frequently condemned the practice of singling out particular facts in a case and telling the jury that if they find them in a certain way they must render their verdict accordingly. Instructions should be founded on all the evidence and take in the whole case. But it is equally well established that we will not reverse a judgment because one of the instructions is technically erroneous, provided the instructions given, all taken together, fairly present the law on both sides of the case to the jury and present the whole case in a manner that is not calculated to mislead. (*Moore vs. Sauborin*, 42 Mo., 490; *McKeon vs. Citizens' Railway Company*, 43 Mo., 405; *Marshall vs. Thames Fire Insurance Company*, 43 Mo., 586; *Budd vs. Hoffheimer*, 52 Mo., 297; *Porter vs. Harrison*, *Ib.*, 524.)

The two instructions given on the request of the defendant fully supply all omissions in plaintiff's instruction. They

devolve on the plaintiffs the burden of proving affirmatively that when defendant purchased the flour he intended to defraud plaintiffs, and not to pay for the same according to the agreement between the parties. When all the instructions are fairly considered together, they surely had no tendency to mislead. Where instructions are given that are inconsistent, it will be error, for the reason that the jury is as likely to follow the one as the other; but in the present case no such inconsistency occurs; the one was not sufficiently comprehensive, but the others clearly and fully supply the deficiency, and I am therefore of the opinion that there is no good ground for disturbing the judgment.

It must be accordingly affirmed. The other judges concur.



MARCUS A. WOLFF, Appellant, vs. LITTLETON H. WALTER,  
et al., Respondents.

1. *Mortgage—Note secured by—Payment of—Subrogation—Remedy against estate of married woman, etc.*—Where a third person, at the instance of a mortgagor, or for his own protection, pays a note secured by the mortgage, he becomes entitled in equity to the benefit of the mortgage; and in such case, a court of equity will subrogate him to all the rights of the creditor. But where the owner of the property mortgaged is no party to the note, and is a stranger to the transaction by which the note was paid, and is a married woman not holding the land in her own separate right, the party so paying the note, can have no claim on the property.
2. *Supreme Court—What points examined by.*—The Supreme Court will only pass upon such points as were presented in the court below.

*Appeal from St. Louis Circuit Court.*

W. B. Thompson and R. S. McDonald, for Appellant.

Glover & Shepley and Dryden & Dryden, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery, to have the acknowledgment of satisfaction of a deed of trust, which had been entered on the margin of the record of said deed, in the recorder's office of St. Louis county, vacated and annulled.

The petition alleges, that the deed of trust was executed by the defendants, Littleton H. Walter and Mary R. Walter, his wife, to the defendants, Purdy and Purdy, to secure the payment of a certain note, which was executed by the defendant Littleton H. Walter, to the defendant, Ann M. Eddy. The petition further charges that, at the maturity of the note, by a negotiation between the plaintiff and the defendant, Littleton H. Walter, who owed the note, the former purchased the note, and was to hold it for the accommodation of said Littleton H. Walter, for a few months; that, after such purchase and without his consent, Mrs. Ann M. Eddy, the former beneficiary, under the deed of trust, acknowledged satisfaction of the same on the margin of the record in the recorder's office of St. Louis county.

The several defendants answered separately. All of them except Littleton H. Walter, denied that the plaintiff had purchased the note in question, and alleged that the note had been paid off and discharged by the maker, Littleton H. Walter, at maturity, and that the defendant, Ann M. Eddy, by reason of such payment being legally bound to do so, did enter satisfaction of record of the deed of trust. The defendant, Littleton H. Walter, by not denying, admitted that the plaintiff had purchased the note, as stated in his petition.

When this suit was instituted, the defendants, Littleton H. and Mary R. Walter, were living separately and apart from each other, and she answered by her next friend. The property which was covered by the deed of trust was owned by the defendants, Littleton H. and Mary R. Walter, as tenants in common, with a right of survivorship to the longest liver, in case there were no children of the marriage. It was not a tenancy by the entirety, but expressly declared by the deed to be a tenancy in common.



The only issue presented by the pleadings was, whether the note in dispute had been purchased by the plaintiff as alleged in his petition. The evidence was all directed to this point. The witnesses on both sides consisted of the parties to the suit and two bank officers in the bank of Benoist & Co., where the note had been deposited by the payee, Ann M. Eddy, for collection. The plaintiff and defendant, Littleton H. Walter, swore to the facts as stated in the petition. Ann M. Eddy, the owner of the note, swore that she did not sell or authorize the note to be sold to the plaintiff; that the bank officers only had authority to receive payment, and not to sell or transfer the note. The bank officers corroborated Ann M. Eddy, and testified that the note was paid at maturity; that on the day it matured, the plaintiff and defendant, Littleton H. Walter, came to the bank and wanted to pay the note, and the teller received the plaintiff's check for the amount in payment of the note, and erased Ann M. Eddy's name which had been indorsed upon the note, and handed the note and deed of trust to the plaintiff; that he had no authority to sell, and did not sell the note.

This was substantially the evidence in regard to the payment of the note. The court at special term, found the issue and gave judgment for the defendants, which was affirmed at General Term, and the plaintiff has appealed to this court.

1. The weight of evidence upon the issue as presented, seems to be in favor of the finding of the court below. There could be no legal transfer of the note, without the assent of the holder. The bank only had authority to receive payment, and not to sell or transfer the note. From the preponderance of the evidence, the transaction appears to have been a payment and not a sale or transfer of the note.

2. But the learned counsel for plaintiff raises the point here, that it is wholly immaterial whether the plaintiff bought the note or paid it; for if he paid it, a court of equity would subrogate him to all the rights of the creditor, and keep the deed of trust alive to reimburse him.

The doctrine is well established by the authorities relied on by the counsel for plaintiff, that when a third person, at the instance of a mortgagor, or for his own protection, pays the debt secured by the mortgage, he becomes entitled in equity to the benefit of the mortgage; and in such case a court of equity will subrogate him to all the rights of the creditor. (Hoy vs. Bramhal, 4 C. E. Green., [N. J.] 563; Pierson vs. Anderson, 4 Edwards, ch. 17; Robinson vs. Urquhart, 1 Beas., 515; Peltz vs. Clark, 5 Pet. U. S., 482; Carter vs. Taylor, 3 Head., 30.)

But the case under consideration, so far as Mrs. Mary R. Walter's rights are involved, does not fall within the rule laid down in those cases. She was not a party to the note; nor was she consulted at all in regard to its payment. Her property, it is true, was mortgaged to pay the note of her husband. So far as the record shows the transaction, she was an entire stranger to the alleged arrangement between her husband and the plaintiff, to keep the mortgage alive for his benefit. As she was not *sui juris*, she could not give her consent to an extension of time for payment of the debt, unless the property was held for her sole and separate use, and this does not appear from the record. Besides, this petition was not framed with a view to the subrogation of the plaintiff to the right of the creditor. The point is made here for the first time, and we cannot entertain it, as it is our province to pass on only such matters as the pleadings and evidence presented to the court below.

Upon the whole record, I think the judgment was for the right parties. Affirmed; all the judges concur.

---

O'Neil, et al. v. Capelle.

---

ELLEN F. O'NEIL, *et al.*, Respondents, *vs.* JOHN P. CAPELLE,  
Appellant.

1. *Instructions should present the whole case.*—If an instruction does not cover the whole case, the court may modify it so as to present the views of both parties under the pleadings and the evidence.

*Appeal from St. Louis Circuit Court.*

*Wells Hendershott*, for Appellant.

*A. H. Bereman*, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action for money loaned to defendant to be paid on demand.

The petition alleges that in 1868 the plaintiff loaned five thousand dollars to the defendant to be paid on demand; that in 1870, he agreed in writing to pay interest on the loan at ten per cent. per annum.

The defendant set up a counter-claim for monies advanced, goods, wares and merchandise sold and delivered, and labor done and materials furnished amounting in all to the sum of \$5,335.80-100. There was no denial of any of the allegations of the petition.

The plaintiff replied to the counter-claim denying all indebtedness as charged by defendant, and alleging that the money advanced, the goods sold, and labor performed, and materials furnished by defendant, were in payment of interest on the money she had loaned to defendant.

The only issue made by the pleadings and evidence, was in regard to the counter-claim; that is, whether the items charged were payments of interest on the money loaned by plaintiff to defendant or not. Both parties gave evidence tending to establish their respective theories of the defense and the instructions given on each side to the jury presented the views of each party.

The defendant asked an instruction, which was refused, to the effect that if the jury found the several items of the counter-claim named in the instruction for defendant, then they

must find the other in his favor, etc. The court modified some of the defendant's instructions so as to make them present both sides of the case, and to this action of the court the defendant excepted. The defendant also asked an instruction in regard to the allowance of interest, to the effect that the ten per cent. per annum interest ought to be allowed on both sides. This instruction was refused and the defendant excepted. The jury found a verdict for the plaintiff, and defendant filed a motion for a new trial, and amongst other reasons for the same, alleged that in the absence of the court and the defendant's counsel, the plaintiff's counsel read to the jury parts of a deposition which had been excluded as evidence. This motion is supported by the affidavit of a bystander; but the affidavit does not set forth what parts of the deposition were read, or whether they were at all material to the case. The motion for a new trial was overruled and the defendant excepted. The court rendered a final judgment for the plaintiff, which on appeal to the General Term was affirmed and the defendant has appealed to this court.

There was no error in giving or refusing instructions. If an instruction does not cover the whole case, the court may modify it so as to present the views of both parties under the evidence and pleadings.

The instructions asked by the defendant to allow interest at ten per cent. on his counter-claim, and to allow the whole counter-claim, if part of the items were found to be just, are so manifestly erroneous under the evidence given, as to require no comment. And the same remark may be made in regard to the new matter relied on in the motion for a new trial. There is nothing in the record to show that the parts of the deposition read by counsel in his argument to the jury, which had been excluded by the court, were at all material to the case or had the slightest effect on the verdict.

Upon the whole record the judgment appears to be for the right party.

Judgment affirmed; all the judges concur.

CITY to use of RICHARD D. LANCASTER, Assignee of GEORGE PRENDERGAST, Respondent, vs. DAVID H. ARMSTRONG, Appellant.

1. *Corporations, municipal—Sewers—Private property—Contracts—City Officers, authority of.*—The route of a sewer in the city of St. Louis, as established by ordinance, ran through the private property of an individual, who objected to its being laid there, and was unwilling to pay for it. Thereupon, the chairman of the sewer committee of the city council, the superintendent of sewers, and the city engineer agreed with him that if he would dedicate the portion of his land necessary for the construction of the sewer, the time of payment on his part would be extended for three years, and upon this agreement the dedication was made, and the work proceeded. Suit was brought by the contractor for the work, against the owner of the land so dedicated, within a year after the work was completed. *Held*, that, as the sewer ran through the private land of defendant, the city manifestly had no right to proceed till the same was condemned, or the owner's consent or relinquishment was obtained; therefore the agreement was valid and binding upon the parties, and constituted the only terms upon which the city had any authority for using the land; and although no special authorization of the officers to make such contract was shown, yet as a corporation acts only through its officers, and as these officers were charged with the specific power of constructing and superintending sewers, and the city availed itself of the benefit of their acts, a ratification would be presumed. The contractor had no rights against the defendant under illegal proceedings, and as the right of way was relinquished on certain conditions, his rights were subject to those conditions, and he had no right to bring his suit until the three years had expired.

*Appeal from St. Louis Circuit Court.*

*A. Reese*, for Appellant.

I. The second ordinance passed in consequence of the agreement with defendant for the right of way, without which the city could not have taken the sewer through his ground. The city availed itself of the agreement, and profited thereby.

II. The city had no right to put the sewer on Armstrong's ground without his consent. It was private property; there was no alley through it, and the city was in no condition to condemn it, not having provided by ordinance for opening an alley through it.

III. The city has no power to condemn private property for district sewers, but may for public sewers. (See Rev. Ord. 1871, pp. 100, 101, §§ 10, 11, 12, 13, 14, 15, 16, as to division of sewers into classes, Public, District and Private.)

IV. The city accepted the benefits of the concession, took possession, built the sewer through defendant's ground, and has been enjoying its use ever since. The city is estopped from denying the authority of its agents to make the agreement, having accepted the benefits. (1 Pars. Cont., [5th Amer'n Ed.] p. 44, and notes.) If one accepts the benefit of a service, in law, it is on the same footing as a service at request, for which a promise is made. (*Id.* p. 392 and notes.)

*Bakewell & Farish*, for Respondent.

I. The city being a mere nominal plaintiff, (not liable even for costs in the event of an adverse judgment) and having no interest in the bill, was not competent to make any such contract as alleged.

II. No attempt was ever made to make such a contract with the city; but only with some gentlemen, who were only members of a certain sewer committee, and had no more right to bind the city than this court has.

WAGNER, Judge, delivered the opinion of the court.

This was an action on a special tax bill issued by the city engineer, under a sewer contract, to one George Prendergast, and by him assigned to the plaintiff.

The answer set up the invalidity of the ordinances under which this work was done, and as a further and special defense stated that the sewer was built across the defendant's land; that defendant objected to its being constructed there, because he had no use for it, and was unwilling to pay for it, and it was finally agreed that if he would give the city the right of way through his land to construct the sewer, he should not be called upon to make payment for three years from that date; that upon this agreement and express understanding, he did in writing convey to said city the right of way, and that the time for payment had not expired when the suit was brought.

The evidence fully sustained this special defense set up in the answer. It showed that the contract was let out under



the original ordinance establishing the sewer, and that in a short time thereafter the work was stopped, and an amended ordinance adopted by which the route was changed so as to run through the defendant's land. The defendant objected to this, and the city had no right to invade his premises without first condemning his land and procuring the right of way. The chairman of the sewer committee, the superintendent of sewers, and the city engineer then agreed with the defendant, that if he would dedicate the portion necessary for constructing the sewer, so that the same might be built according to the new route established, the time for the payment on his part should be extended to three years. And upon this agreement the dedication was made, and the work proceeded. The contractor was present when this agreement was entered into; but after the work was completed this action was brought in about one year.

The court refused to declare the law to be, that if from the evidence it was found that defendant relinquished the right of way for the sewer in consideration of the agreement or promise that no steps should be taken to collect the tax within three years after the completion of the same, then no recovery could be had till the expiration of that time, and then rendered a judgment for the plaintiff. As the sewer ran through the private land of the defendant, the city manifestly had no right to proceed till the same was either condemned, or till his consent or relinquishment was obtained. The agreement was valid and binding upon the parties, and constituted the only terms upon which the city had any authority for using defendant's land.

But it is insisted upon the argument that the city council never gave its officers any power to make the contract. No express authorization is shown. The settled rule, however, is that a corporation acts only through its officers, and in the present case the officers were charged with the specific power of constructing and superintending sewers, and the city availed itself of the benefit of their acts. A ratification will therefore be presumed. It is also objected that this agreement

---

Ruff v. Doyle, Adm'r of Doyle.

---

could not interfere with the rights of the contractor to have his pay when he completed the work. But as against the defendant, he had no rights under an illegal proceeding; until steps were taken and consummated for condemnation, or until the right of way was relinquished, the city could not use or appropriate the defendant's land, and any contract it might make with any individual for that purpose would be void as to him. And when an agreement was made by which the city acquired the right, all were bound by it. Till the time expired for bringing the suit under that agreement, the plaintiff had no standing in court. This disposes of the case at present, and it is unnecessary to consider any other question.

The judgment must be reversed and the cause remanded. The other judges concur.

— 0 —

ANDREAS RUFF, Respondent, vs. KATE DOYLE, Administratrix of PATRICK DOYLE, Deceased, Appellant.

1. *Probate Court—Administrator—Embezzlement, trial for—Judgment will authorize appeal.*—In a proceeding before the Probate Court against an administrator, charging him with concealing and embezzling the assets of the estate. (See Wagn. Stat., p. 85, §§ 7, 8, 10,) judgment on the merits would be a final one, as contemplated by the statute, so as to authorize an appeal to the Circuit Court.

*Appeal from St. Louis Circuit Court:*

Henry N. Hart, for Appellant.

H. B. Lighthizer, for Respondent.

WAGNER, Judge, delivered the opinion of the court

This proceeding was originally instituted in the Probate Court by the plaintiff against the defendant, who was administratrix of the estate of Patrick Doyle, deceased, charging her with concealing and embezzling certain assets belonging to that estate. The cause was tried in the Probate Court,

---

Ruff v. Doyle, Adm'r of Doyle.

---

where judgment was rendered for the defendant, and the plaintiff appealed to the Circuit Court where, at Special Term, the appeal was dismissed, on the ground that the statute did not allow an appeal in such a case. The plaintiff then took the case to the court in General Term where the judgment at Special Term was reversed, and the defendant has brought the case here.

By section 7 of the statute (1 Wagn. Stat., p. 85.) under which this proceeding originated, it is declared, that "if the executor or administrator, or other person interested in any estate, file an affidavit in the proper court stating that the affiant has good cause to believe, and does believe, that any person has concealed or embezzled any goods, chattels, money, books, papers or evidences of debt of the deceased, and has them in his possession or under his control, the court may cite such person to appear before them, and compel such appearance by attachment and examine him and other witnesses on oath for the discovery of the same."

Section 8 provides that "if any person interested in any estate, file a like affidavit against an executor or administrator, the court shall have the same power to cite him and compel his appearance and examination as in case of other persons."

Section 10 prescribes the mode of procedure, and says, that "if any person charged and cited as aforesaid, shall appear and, in his answer to the interrogatories deny the truth of the facts alleged in the affidavit, the issue shall be tried by a jury, or, if neither party require a jury, by the court, in a summary manner, and judgment shall be rendered according to the finding, and for costs."

It is observable that the issue is regularly tried by a jury, or by the court, at the election of the parties, and upon the verdict a judgment is rendered followed by costs, in the same manner as in other actions where a final judgment is given.

Now the statute in reference to appeals under the administration law declares, that "appeals shall be allowed from the decisions of the court having probate jurisdiction to the Circuit Court, in the following cases:" First, on all demands

against an estate exceeding ten dollars; second, on all settlements of executors and administrators; third, on all apportionments among creditors, legatees or distributees; fourth, on all orders directing the payment of legacies, making distribution, or making allowances to the widow; fifth, on all orders for the sale of personal estate because distribution cannot be made in kind; sixth, on all orders for the sale of real estate; seventh, on judgments for waste; eighth, on proceedings to recover balances escheated to the State; ninth, on all orders revoking letters testamentary, or of administration; tenth, on orders making allowances for the expenses of administration; eleventh, on orders for the specific execution of contracts; twelfth, on orders compelling legatees and distributees to refund, and in all other cases where there shall be a final decision of any matter arising under the provisions of this law. (See Wagn. Stat., 119, § 1.)

The section under which the issue is tried provides for a judgment and costs to be rendered upon the finding of facts. This is certainly as much a final determination of the matter in controversy, as any of the specific orders, judgments or decrees referred to in the first section in regard to appeals. But the twelfth clause is general, and applies to all other cases where there shall be a final judgment touching any matter arising under the administration law. This case is a matter arising under that law, and upon a finding of the facts a final judgment is rendered, together with costs. If this judgment was permitted to stand unappealed from, and unreversed, it would be conclusive and final between the parties. It differs wholly from an annual settlement, which is made by the administrator from time to time, and is nothing but a mere continuation of the affairs touching the administration, and is not conclusive till a final administration is reached. But should an attempt be made to investigate this subject upon a final settlement, the administratrix would meet the attempt, and meet it successfully I think, by pleading the judgment obtained in her favor in bar.

---

Jillett, et al. v. Union National Bank, et al.

---

In my opinion it is one of the final judgments contemplated by the statute, and that the right of appeal is clearly given.

Wherefore the judgment at General Term should be affirmed. All the judges concur.

—o—

**E. L. JILLETT, et al., Plaintiffs in Error, vs. UNION NATIONAL BANK, et al., Defendants in Error.**<sup>4</sup>

1. *Probate Court—Administration—Assignment of claim—Error in, corrected nunc pro tunc, when—Injunction—Equity, etc.*—A clerk of probate being misled by an erroneous memorandum of the judge, assigned the claim of A, which properly belonged to the 6th class in an administrator's settlement to the 5th class, thereby causing said claim to be paid, and sacrificing others of the 6th class.

A creditor of the 6th class at a term subsequent to the erroneous assignment brought suit against A and the administrator, to enjoin A from proceeding to enforce his claim and to compel the administrator to assign said claim to the proper class:

*Held:* 1st, that the remedy of plaintiff was by a motion in the Probate Court to correct the error *nunc pro tunc* and not by injunction; 2nd. that although plaintiff was ignorant and A was aware of the mistake at the term wherein it occurred, and during which appeal would lie to remedy it, yet there being no relation of trust between A and the plaintiff requiring a disclosure of the facts, and no trick or artifice to produce or conceal the mistake being shown, plaintiff had as against A no equity on this ground.

*Error to St. Louis Circuit Court.*

*S. N. Taylor*, for Plaintiff in Error.

I. The Probate Court cannot change the classification of demands against an administrator's estate at a subsequent term. (*Miller vs. Janney*, 15 Mo., 265; *Nelson vs. O'Brien*, *Id.*, 357.)

Motion to correct will not lie in such case.

II. The case of *Gibson vs. Chouteau*, (45 Mo., 173.) was one where the mistake was that of the clerk and not the court. But where the court omits an order which it ought to have made, the error cannot correct the error *nunc pro tunc*. (*Hyde vs. Curling*, 10 Mo., 359.)

*T. K. Skinker*, for Defendants in Error.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiffs had certain claims allowed in the Probate Court of St. Louis County against the estate of Turner Maddox, deceased, and placed in the 6th class. At a subsequent period, but during the same term, the Union National Bank, also had two claims probated against the same estate. These claims should likewise have been placed in the 6th class, and had it not been for the clerical mistake of the probate judge in indorsing a memorandum on the claims, to the effect that they belonged to the 5th class, a proper classification would have taken place; as the clerk, misled by the erroneous memorandum of the judge conformed his record entries to such memoranda. The plaintiffs were unaware of this error having been committed, until the time had elapsed for taking an appeal. The Union Bank discovered the error committed in its favor during the term at which it occurred, but did not communicate that fact; and when applied to by plaintiffs after the close of the term at which the allowances were made, declined to have any correction made therein. The 1st, 2nd, 3rd and 4th class claims against the estate were paid, and a sufficiency of assets was left to pay the 5th class, and something over twenty-five per cent. on that to which the claims of plaintiffs belonged, unless the claims of the Bank are permitted to remain as originally and erroneously classed. A petition making the above allegations, and further in effect alleging, that the failure of the Bank to disclose the mistake which had occurred in the classification of the claims in its favor, was a fraudulent concealment of facts of which it now sought to unfairly avail itself was filed by plaintiffs, and their prayer was: "That said claims in favor of said Bank \* \* \* \* be placed in the 6th class of claims against said estate; that said Union National Bank be prohibited and enjoined from enforcing its said claims as 5th class claims against said estate; that Andrew W. Mead administrator of said estate be prohibited and enjoined from paying said claims and judgment in favor of said Bank as 5th class claims;



but that they be adjudged in all respects as 6th class claims, and payments made on them in all respects as 6th class claims, and payments made on them only as on other 6th class claims against said estate, and for such other and further relief, as to the court may seem equitable." This petition was held insufficient on demurrer, and the propriety of this ruling is now to be considered.

The insufficiency of the petition is apparent for two reasons, without adverting to any more: First—It is evident that an ample remedy exists at law for the redress of the grievance whereof the plaintiffs complain; Second—If no such remedy could be attained by legal procedure, still the petition states no grounds for equitable interposition. The mistake complained of could be corrected by an entry *nunc pro tunc*. The right to correct mistakes and misprisions by an entry of this sort, attaches as a necessary incident to the jurisdiction of every court of record, whether such jurisdiction be general or limited. And according to the plaintiffs own showing, the necessary data to amend by, are furnished by the *memoranda* indorsed on the claims, and the record entries in relation thereto. The doctrines respecting amendments of this character, have been heretofore so exhaustively considered by this court, and so firmly established by its former adjudications, that further discussion of the subject at my hands is entirely unnecessary. (*Gibson vs. Chouteau*, 45 Mo., 173, and cases cited; *Benoist, Exr. vs. Christy*, 50 Mo., 145; *Priest vs. McMaster*, 52 Mo., 60.)

The cases of *Miller vs. Janney's Exr.*, 15 Mo., 265, and *Nelson vs. Russell's Admr.*, *Id.*, 356, cited by plaintiffs as being in point, by no means infringe upon, or gainsay, the above mentioned rule. It is not the office or purpose of a *nunc pro tunc* entry to set aside a judgment rendered at a former term; but, as the very words import, to make the record disclose the judgment which the court actually gave at the time referred to in the amended entry. But the petition shows no grounds why equity should interpose even if there were no remedy at law. Had there been any relations of especial

trust and confidence existing between the parties, or had the bank been under some legal or equitable obligation to communicate to the plaintiff its discovery of those facts which would have operated in its favor, and adversely to their interests; or had the Bank been active in occasioning the mistake, or used trick or artifice to prevent its becoming known, a question widely different from the one presented by the petition would be here for our consideration. The above stated doctrine is applied by the books to cases even where parties deal and contract directly with each other; and, *a fortiori*, it should with greater force apply to a case like the present, where no such dealings have taken place. And it would be in the face of all the authorities, to hold a party chargeable with fraudulent concealment merely because of the non-disclosure of a fact which neither law nor equity require to be disclosed. (1 Story Eq. Jur. §§ 204, 205, 206, 207; Kerr on Fr. & Mist pp, 353, 408, 414.)

Judgment affirmed; the other judges concur.

---

WILLIAM GREER, Respondent, *vs.* LOUIS S. YOSTI, Appellant.

1. *Bills and notes—Holder for value before maturity presumed to be an innocent holder—Consideration, when can be impeached.*—The indorsee of negotiable paper for value before maturity is presumed to be an innocent holder, and must be so treated in the absence of proof to the contrary; and without such proof no evidence is admissible to impeach the consideration.
2. *Bills and notes—Consideration, what sufficient notice of fraud.*—The notice of fraud must be at least sufficient to put the purchaser on inquiry. Express notice is not indispensable; it will be sufficient if the circumstances are such as to strongly indicate that there was fraud in procuring the paper; but the circumstances must be of such a strong and pointed character as necessarily to cast a shade on the transaction and to put the holder on inquiry.

*Appeal from St. Louis Circuit Court.*

Henry B. O'Reilly, for Appellant.

T. H. Wilson, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note, brought by the plaintiff as indorsee for value before maturity against the plaintiff as maker. The suit originated before a justice of the peace and was taken to the Circuit Court by appeal, and was submitted to a jury for trial and resulted in a verdict and judgment in favor of the plaintiff, which was affirmed at General Term and the defendant has appealed to this court.

( The defendant offered evidence to impeach the consideration of the note, which was excluded by the court and he excepted. There was no evidence offered, or given, that the plaintiff at the time he purchased the note had any information or notice in regard to the alleged infirmity of the consideration of the note.

The indorsee of negotiable paper for value before maturity, is presumed to be an innocent holder and must be so treated in the absence of proof to the contrary; and without such proof, no evidence is admissible to impeach the consideration.

The notice of the fraud must be at least sufficient to put the purchaser of the paper on inquiry. Express notice is not indispensable. It will be sufficient if the circumstances are such as to strongly indicate that there was fraud in procuring the paper. But the circumstances must be of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder on inquiry. (*Hamilton vs. Marks*, 52 Mo., 78; *Horton vs. Bayne*, 52 Mo., 531; *Corby vs. Butler*, 55 Mo., 398; *Bennett vs. Torlina*, *post*, p. 309.) The record does not present any evidence to warrant the conclusion that the plaintiff had any notice whatever of the alleged fraud in the consideration of this note. There seems to be no error to justify us in disturbing this judgment.

Judgment affirmed; Judge Wagner absent, the other judges concur.

HIRAM C. BENNETT, *et al.*, Respondents, *vs.* JNO. D. TORLINA,  
*et al.*, Appellants.

1. *Bills and notes—Innocent holder—Consideration.*—A negotiable note in the hands of an innocent purchaser for value before maturity is protected from all inquiry into the consideration.

*Appeal from St. Louis Circuit Court.*

Henry N. Hart, for Appellants.

Krum & Patrick, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note, brought by the plaintiffs as indorsees for value before maturity, against the defendants as prior indorsers.

The only material point raised by the record is, whether the defendants could impeach the consideration of the note without first introducing evidence conducing to prove that the plaintiffs were aware of the alleged failure of consideration.

The defendants set up as a defense a total failure of consideration. The court refused to permit them to inquire into the consideration without first proving that the plaintiffs had notice or information sufficient to put them on inquiry of the alleged infirmity in the consideration of the note at the time they made the purchase.

The doctrine, that a negotiable note in the hands of an innocent holder for value is protected from all inquiry into the consideration, is too familiar to be seriously discussed, or maintained by the citation of authorities. It forms the very basis of the free circulation of all commercial paper, and I am not aware that it has ever been doubted by any respectable court.

Let the judgment be affirmed; all the judges concur.

---

Griffin v. Veil.

---

LE ROY GRIFFIN, Respondent, vs. AMADEE VEIL, Appellant.

SAME vs. SAME.

1. *Judgment—Default—Setting aside, matter of discretion with trial court.*—Whether application to set aside judgment by default on the ground that counsel, when the case was called, was disposing of a case in another court should be granted, held a question to be determined by the trial court in the exercise of a sound discretion. (See Jacob vs. McLean, 24 Mo., 40.)

*Appeal from St. Louis Circuit Court.**Mitchell & McGaffey*, for Appellant.

ADAMS, Judge, delivered the opinion of the court.

These two cases present precisely the same point for our determination and are therefore considered together. They are appeals from a justice of the peace. The judgments before the justice were rendered in favor of the defendant, and in due time on a subsequent day the plaintiff appealed to the Circuit Court and the justice returned the appeals and they were filed on the 19th day of April, 1870.

In June, 1872, the cases were called for trial in the Circuit Court, and the defendant failing to appear, judgments by default were taken and made final in favor of the plaintiff. The defendant afterwards filed motions to set aside the judgments, and for a new trial which were overruled and he excepted.

The judgments were affirmed at General Term, and the defendant has appealed to this court. The only grounds relied on in the motions for a new trial, were that the defendant had a good and meritorious defense, and that his attorney at the time the cases were called, was necessarily absent attending to an important criminal case pending in the Court of Criminal Correction of St. Louis county; that both courts convened at the same hour, and the attorney hastened to the Court of Criminal Correction and procured a continuance of the case pending in that court, and was not absent more than half an hour—when he returned and found that judgments had been taken in these cases a few minutes previously. These facts were supported by the affidavit of the attorney.

---

Bobb v. Taylor, et al.

---

If the facts contained in this affidavit formed a good ground for setting aside judgments and granting new trials, it would be almost impossible in a large city like St. Louis, to transact the business of the numerous courts. They are generally all or many of them in session at the same time. If the courts were bound to consult the convenience or business of attorneys in calling their dockets, it is manifest that no dispatch could be used in the disposition of causes. These courts must be allowed to exercise their own discretion as to how far counsel may be tolerated in absenting themselves when cases are likely to be called. It would require a very strong case to require the discretion of this court to be substituted for that of the courts of first instance. This very point was before this court in *Jacob vs. McLean*, (24 Mo., 40,) and was determined in the same way.

Judgment affirmed, Judge Wagner absent; the other judges concur.

—o—

JOHN H. BOBB, Plaintiff in Error, vs. JAMES K. TAYLOR, et al., Defendants in Error.

1. *Judgment—Assignment of—Equity.*—An assignee of a judgment which has been compromised cannot enforce it against the defendant in the judgment. The assignee takes the judgment subject to all its equities. And, *a fortiori*, a bill in equity will not lie on behalf of the creditors of the assignee, to enforce it against the judgment creditor.

*Error to St. Louis Circuit Court.*

H. A. Clover, for Plaintiff in Error.

Lackland, Martin & Lackland, for Defendants in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity by the plaintiff, as assignee of a judgment against the defendant, James K. Taylor, to subject to its payment, a certain other judgment against the defendant Charles Bobb, which was alleged to belong to said James K. Taylor.



The leading facts as they appear from the pleadings and evidence are as follows: The Accommodation Bank of St. Louis, on the 24th day of April, 1872, recovered a judgment for \$940.70 against Joseph Geitner, Charles E. Dunn and the defendant James K. Taylor, in the Circuit Court of St. Louis county. On the 15th day of April, 1872, the Accommodation Bank of St. Louis assigned their said judgment to the plaintiff, and it is for the purpose of obtaining satisfaction of this judgment out of the one alleged to belong to Taylor, that this suit is brought. On the 3rd day of January, 1872, Thomas B. Crews and Joseph S. Laurie recovered a judgment in the St. Louis Circuit Court, against the defendant Charles Bobb, for the sum of \$2,200. On the 6th day of January 1872, Crews and Laurie assigned their said judgment to the defendant, James K. Taylor. It is alleged in the petition, that Taylor assigned this judgment to Levi L. Ashbrook on the 27th of June, 1872, and that this assignment to Ashbrook was fraudulent and void as to the creditors of Taylor. It is this judgment that the plaintiff seeks to subject to the payment of the judgment, held by him against Taylor.

The proof shows that the assignment to Taylor was made at the request of Charles Bobb the judgment debtor; that Charles Bobb compromised with Crews and Laurie by paying them part of the amount, and instead of having it released or entered satisfied, he had it assigned to Taylor to hold it for him; that Taylor paid nothing for the assignment but merely took it to hold for the benefit of Charles Bobb, the judgment debtor, and that Taylor received nothing for his assignment of the judgment to Ashbrook, and that Ashbrook did not claim it as his own, but held it for the benefit of Charles Bobb, the judgment debtor.

Upon these facts the court on the final hearing dismissed the plaintiff's petition, and rendered final judgment against him, which was affirmed at General Term, and the plaintiff has brought the case here by writ of error.

From the facts presented by this record the plaintiff had no standing in court. The transaction between Crews and

Laurie and the defendant Charles Bobb amounted to a satisfaction of their judgment against him. After making the compromise with him they could not have again enforced payment of the judgment against him; nor could an assignee from them even if he had paid full value for it compel payment. An assignee of a chose in action, except it be commercial paper before maturity, takes it subject to all the equities existing between the original parties. This principle is too familiar to need illustration or authority to support it. If Taylor, as assignee, could not have enforced payment of the judgment against Charles Bobb, certainly his creditors who were strangers to him had no equity to compel him to pay their debts due from Taylor.

Charles Bobb could not have kept the judgment, which he had settled, on foot to hinder and delay his creditors in the collection of their debts. The assignment to Taylor at the instance of Bobb's creditors, would no doubt be pronounced fraudulent and void; and a court of equity would not permit it to stand in their way. But they are not complaining. It is a creditor of Taylor, and not of Bobb, who seeks to enforce against Bobb, a judgment which he has compromised and satisfied.

There is no question of estoppel in the case. There is nothing to estop Bobb from standing on his rights. Taylor paid nothing for the assignment; he took it for the benefit of Bobb, the judgment debtor. Even if he had purchased for value without notice of the compromise, the compromise and settlement made by Bobb would have been a bar to any recovery.

If Taylor had made the purchase on the representation of Bobb, that the judgment against him remained unsatisfied, that would have been an estoppel; and Bobb would not be allowed to set up payment against his own admission thus acted on by Taylor.

On the whole record the judgment appears to be for the right party. Judgment affirmed. The other judges concur.

---

Howard, et al. v. Smith.

---

ROBERT S. HOWARD, *et al.*, Respondents, *vs.* FREDERICK W. SMITH, Appellant.

1. *Contracts—Factors—Commission merchants—Rights of—Advances.*—Where merchandize is consigned to a commission merchant to be held and disposed of on account of the consignor, without any specific orders as to time and mode of sale, and the consignee makes advances or incurs liabilities on the consignment for the benefit of the consignor, the legal presumption is, that the consignee is clothed with the ordinary right of factors to sell, in the exercise of a sound discretion, at such time and in such a manner as the usage of trade and his general duty require, and to re-imburse himself for his liabilities out of the proceeds of the sale; and the consignor has no right by subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale except so far as respects any surplus not necessary for the re-imbursement of such advances or liabilities. And where the consignee has called upon the consignor to advance to him a sufficient sum to indemnify him against loss, and the consignor has failed to do so, the consignee has the undoubted right, in the exercise of a sound discretion to sell so much as is necessary for his protection, at the current rates; even though such sale be made at a lower rate than demanded by the consignor.

*Appeal from St. Louis Circuit Court.*

*Slayback & Hæussler*, for Appellant.

I. A merchant assenting to sell on orders is not at liberty to disobey them. (Given vs. Lemoine, 35 Mo., 119.)

II. If respondent received our order to sell at seventy cents, and telegraphed that they were selling as fast as possible, they should certainly account at that price for all sold after that date.

*S. M. Smith*, for Respondents.

"There can be no doubt of the proposition, that in a case where the protection of the factor himself becomes necessary, his discretion as to time, price and place of sale would be complete and unlimited even by positive instructions." (Phillips vs. Scott, 43 Mo., 92; see also Given vs. Lemoine, 35 Mo., 119; Denny vs. Rhodes, 18 Mo., 152; Brown vs. McGraw, 14 Pet., 479; 1 Sand., 360.)

---

Howard, et al. v. Smith.

---

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs, who were commission merchants at New Orleans, received in June, 1870, a consignment of 310 sacks of oats from defendant, and also purchased for defendant at his request 2065 sacks of oats in the same month, making in all 2375 sacks, held by plaintiffs from purchase and consignment as factors for defendant and on his account. Plaintiffs made a large advance on the oats consigned to the defendant, and on July 27, 1870, defendant ordered the plaintiffs to sell the oats at sixty-seven cents per bushel or better. That price could not be obtained for the oats in the market, and they were not sold. On August 4, 1870, plaintiffs drew a draft on defendant for \$1000, as margin on said oats, which draft was not paid. On Sept. 20, 1870, plaintiffs again wrote to defendant asking him if they should sell, and saying that after waiting a reasonable time they should proceed to sell. They however still continued to carry the oats till December 28, 1870, when they drew another draft on defendant for \$1,500 to indemnify them, but this draft was not paid. Plaintiffs waited till January 11, 1871, and then commenced selling at the prevailing market prices. On the 27th day of January, 1871, defendant instructed the plaintiffs to sell the oats at seventy cents per bushel, unless they believed that oats would go higher, and plaintiffs replied that they were selling as fast as possible. The evidence shows that the oats were sold at full market prices, but they did not bring the amounts limited by the defendant in his instructions; and after crediting the defendant with the money realized from their sale, there was found to be a balance due to plaintiffs for which they brought their action. In the Circuit Court they obtained judgment.

The main question is, whether the plaintiffs had the right to sell to re-imburse and protect themselves for their advances and liabilities incurred for, and on account of, the defendant.

Gamble, J. in his opinion in *Denny vs. Rhodes*, (18 Mo., 147,) says that a factor may sell, to re-imburse his advances, so much of the consignment as is necessary for that purpose, if the sale is made in the usual mode; and in *Phillips vs.*

Scott, (43 Mo., 92,) it was declared that there could be no doubt of the proposition, that in a case where the protection of the factor himself against loss became necessary, his discretion as to time, price and place of sale would be complete and unlimited, even by positive instructions.

In the leading case of *Brown vs. McGraw*, (14 Pet., 479,) it was held (Story, J. delivering the opinion) that where the consignment is made generally, without any specific orders as to time and mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors, to sell in the exercise of a sound discretion, at such time and in such manner as the usage of trade and his general duty require, and to reimburse himself for his liabilities out of the proceeds of the sale; and the consignor has no right by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities. (*Marfield vs. Douglass*, 1 Sandf., 360; 3 Comst.; *Blot vs. Boiceau*, *Id.*, 78; *Gihon vs. Stanton*, 5 Seld., 476; *Blackman vs. Thomas*, 28 N. Y., 67; *Field vs. Farrington*, 10 Wall., 141.) When the defendant consigned the 310 sacks of oats to the plaintiffs, it does not appear that any specific instructions were given in reference to the price or terms of sale. But plaintiffs held them and made advances on them. The 2065 sacks were purchased for the defendant at his request by the plaintiffs, they advancing the money to pay for them. The market was drooping and depressed, and they were unable to sell for the price demanded by the defendant. Under these circumstances, plaintiffs applied to defendant for an advance to indemnify and protect them against loss, but defendant refused to accede to this request. We think then, that in the exercise of a proper discretion, and for the purpose of protecting themselves, the plaintiffs had the undoubted right to sell so much as was necessary for their protection at the current rates.

They had made no agreement to hold on to the oats an indefinite time, and lie out of the use of their money, and unless the defendant, when they requested it, had given them an indemnity or protection, they were under no legal obligation to wait longer. This disposes of the only question of any importance in the case. Several objections have been raised to the ruling of the court in respect to the pleadings and the admissibility of evidence, and also in refusing instructions, and we have examined them all, and can find no error that would justify us in disturbing the judgment.

It will therefore be affirmed; the other judges concur.

—o—

HENRY STAGG, Appellant, vs. EUREKA TANNING & CURRYING  
COMPANY, Respondent.

1. *Landlord—Title not disputed by tenant.*—One holding under a lease cannot dispute the title of his lessor by showing him to be trustee of one having adverse or paramount title, and the same rule applies to the assignee of the lessee.

*Appeal from St. Louis Circuit Court.*

*P. E. Bland*, for Appellant.

*Krum & Patrick*, for Respondent.

VORIES, Judge, delivered the opinion of the court

This action was brought by the plaintiff in the St. Louis Circuit Court against the defendant to recover the amount of \$2,086.66, on an account for rent alleged to be due from the defendant to one John How, and which had on the 9th day of August, 1869, been assigned and transferred in writing to the plaintiff.

There is no question made on the pleadings; the petition being in the usual form, setting out the premises leased. The defendant by its answer denies its indebtedness to plaintiff, and for further answer states, that on the 8th day of May, 1861,



---

Stagg v. Eureka Tanning & Currying Co.

---

the said John How did, by his warranty deed bearing date on said day and duly recorded, convey the property leased in fee to one Robert Cook; that said Cook from and after the making of said deed was and until the 29th day of July, 1870, continued to be, the owner in fee of said premises, at which time by his deed of that date the said Cook conveyed the premises to the defendant.

To this answer the plaintiff filed a replication in which he stated "that on the first day of March, 1865, the said John How by his lease of that date leased the said premises mentioned in exhibit "A" filed with plaintiff's petition, to Messrs. Dryer, Schmill & Company, at a yearly rental of twelve hundred dollars, which the said Dryer, Schmill & Company, promised to pay yearly to the said John How, his executors, administrators and assigns, and the said Dryer, Schmill & Company went into possession of the said premises under the said deed of lease, and afterwards transferred the same to the defendant, who went into possession thereunder, and thereby became liable to pay, and promised to pay the said yearly rental; that the whole of the account for rent upon which this suit is brought, accrued, and the amount charged therein against the defendant, became due for said rental after said transfer of said leasehold premises to said defendant; that the defendant recognized its obligation to pay the said account, and assured the plaintiff that it was bound to pay and would pay the same at the time the plaintiff purchased the same, and that he purchased the same and took the said assignment thereof, being induced so to do by, and relying upon, the said assurance and promise made to him by the defendant through its proper officers. The plaintiff further says, that the defendant promised to pay him said assigned account after his purchase thereof. The plaintiff says he does not know the fact, nor has he knowledge thereof sufficient to form a belief, as to whether the said John How did at the time in defendant's answer alleged, or at any other time, sell the said premises to one Robert Cook, as alleged in said answer; but he denies that if such sale was made, the deed thereof was

recorded prior to the date of the said deed of lease. above mentioned, or that it was recorded prior to the date of the assignment of said account as it appears in said exhibit "A" of plaintiff's petition.

A jury was waived by the parties and a trial had before the court. The case was submitted to the court on the following agreed statement of facts :

"That on the first of March, 1865, John How, by his deed of that date, leased the premises referred to in the account sued upon, to Messrs. Dryer, Schmill & Company, for the term of five years from that date, at an annual rental of \$1200, and delivered them possession thereof under said lease ; that said Dryer, Schmill & Company, prior to the 11th day of May, 1865, in writing assigned the said lease, and delivered possession of the said premises thereunder to the defendant ; that on the 9th of August, 1869, the said John How, for value, assigned the said account sued upon to the plaintiff, and that no part of the same has ever been paid ; that on the 8th day of May, 1861, the said John How by deed of that date conveyed the premises to one Robert Cook, and said deed was, on the 4th day of May, 1868, and prior to said account being assigned to plaintiff, recorded in the recorder's office in and for St. Louis County ; that on the 27th day of July, 1870, the said Cook by deed of that date conveyed the said premises in fee to the defendant, and by his assignment of that date conveyed to said defendant all unpaid rent for use and occupation of said premises."

It should have been previously stated that the account sued on was for rent which had accrued before the 1st day of July, 1869, and which was credited by repairs in the sum of five hundred and eighty dollars. It is contended by the plaintiff that under the facts above stated, and agreed to in the case, he had a right to recover ; that the assignors of the defendant having received a lease of the premises from How, and having gone into possession of the leased premises, under the lease, and afterwards while in such possession assigned the lease to the defendant, who took possession of the premises under

said assignment and lease, and the rent sued for having accrued while defendant was holding and occupying the premises under the lease, it cannot, in an action to recover the rent thus accrued, be permitted to dispute the landlord's title to the premises.

The general rule certainly is, that one holding under a lease cannot dispute the landlord's title, and will not be permitted to attorn to a stranger, or to one who claims to hold by a title adverse to, or paramount to that of the landlord; and this applies as well to one who occupies the premises under the lease as assignee of the lease, as to the original lessee. (Taylor's Landl. and Ten., §§ 384, 425, 437, 629; Jackson vs. Rowland, 6 Wend., 666; Walker vs. Harper, 33 Mo., 592; Pentz vs. Kuester, 41 Mo., 447.) The lessee may show that the landlord's title has expired since the execution of the lease, but cannot show a paramount or independent adverse title. (See cases and authorities above cited, and also Taylor's Landl. and Ten., § 89, and cases cited.)

This general rule does not seem to be disputed by the defendant. It will therefore be necessary to see if our statute has changed this common law rule as applicable to the facts of this case. The statute of this State in reference to "Landlords and Tenants," (Wagn. Stat., 880, § 15,) provides that "the attornment of a tenant to a stranger shall be void, and shall not in any wise affect the possession of the landlord, unless it is made; first, with the consent of the landlord; or second, pursuant to, or in consequence of a judgment at law, or a decree in equity, or sale under execution, or deed of trust; or third, a mortgage after the mortgage has been forfeited." It is not difficult to see that the present case does not come within any of the exceptions contained in this statute.

There is one exception however to this general rule, or perhaps it would be more logical to say, that one case does not come within the reason of the rule, which is this: Where an individual is in the possession of land, and while he is so in possession, another induces him by fraudulent pretenses to believe that he is the landlord, and gets the person in posses-

sion by such fraud to acknowledge him as his landlord, the tenant in such case, upon a discovery of the fraud, may deny the title of such fraudulent landlord. (*Gleim vs. Rise*, 6 *Watts.*, 44.) But in such cases the judgments of the courts are placed on the expressed ground, that the possession was not obtained from the landlord; but from another. In such case when the fraud is shown, the fraudulent contract becomes wholly void, and the defendant having been in possession before the fraudulent contract, is remitted to his rights under his original possession. It is however insisted by the defendant, that in this case, How was simply the trustee for Cook after the deed of 1861, and we are referred to the case of *McKittrick vs. Clemens*, (52 *Mo.*, 160,) to sustain this position. By an examination of that case it will be readily perceived that the principle there decided has no application to the facts of this case, whatever. If the defendant being in possession under a lease from How, could say that How was only a trustee for Cook, who claimed by title previous and paramount to the title of How, who was the lessor of defendant, then it cannot be perceived why every tenant could not assume that his landlord was only the trustee of a stranger who claimed by an adverse and paramount title to the landlord, and thus attorn to a stranger, and deny his landlord's title; and thus destroy or subvert the rule of law that a tenant cannot dispute the title of his landlord under whom he received and holds the possession. We can see nothing in this case to take it out of the general rule of the law.

The judgment will be reversed and the cause remanded to the St. Louis Circuit Court at Special Term for further proceedings. The other judges concur.

---

Van Studdiford v. Hazlett.

---

HENRY VAN STUDDIFORD, Trustee of PELAGIE LABARGE, Respondent, vs. HIRAM K. HAZLETT, Appellant.

1. *Contracts—Parol, additional to a written contract—Evidence.*—A contract was made in writing for the transportation of certain troops and officers, which did not expressly provide for their subsistence. *Held*, that a subsequent parol agreement fixing a price for such subsistence, was independent of and not inconsistent with such contract, and that evidence was admissible to prove it.
2. *Practice, civil—Trials—Re-opening of case after it has been submitted—Surprise.*—It is not error to refuse to open a case on the application of a party, after it has been submitted on the evidence. The granting of such an application would be a surprise to the other party.

*Appeal from St. Louis Circuit Court.*

*F. J. Bowman*, for Appellant.

*Rankin & Hayden*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a contract, alleged to have been made by the defendant with plaintiff, to provide subsistence for eleven U. S. Army officers during the time they were to be conveyed on plaintiff's steamboat up the Missouri river, from Omaha, Nebraska, to Fort Buford in Dacotah Territory. The defendant was a contractor under the United States Government, for the transportation of troops and supplies; and the petition alleges that he made a contract with the plaintiff for subsisting said officers during the trip, at one dollar per day for each officer, and that the trip lasted for fifty-one days, from about the 1st of May, 1870, to the 20th of June, 1870, and that plaintiff complied with the terms of the contract.

The answer denied all the material allegations of the petition.

The trial of the case was submitted to the court, both parties waiving a jury.

Upon the trial, a witness named LaBarge testified to the terms of the contract as set forth in the petition, and stated that it was a verbal contract, which had been made subsequent to a written contract made by the defendant with the plaintiff, for the transportation of the troops, and that plaintiff fully performed the contract.

---

Van Studdiford v. Hazlett.

---

The defendant then produced the contract, which reads as follows: "Contract—Rates of freight from St. Louis per 100 lbs: to Fort Rice, \$1.40, to Fort Buford, \$2.00; from Omaha to Fort Buford, for officers, \$30.00, for soldiers, \$8.00. The steamer Emilie LaBarge hereby agrees with H. K. Hazlett, to carry all the government freight, troops and Indian supplies for this trip, at the rates set forth in the above column, and all troops or supplies taken aboard at way points for the government at the same rates *pro rata* per mile, (the government distance to be the basis of settlement) and further agrees that all troops and supplies taken on board on the return of said boat down the river, shall be carried at one-half the above named rates; and it is further agreed that said boat shall not go above Sioux City, Iowa, drawing over three and one-half feet of water. St Louis, this fourth day of April, 1870.

"Duplicate.

JOS. LABARGE, Master,  
H. K. HAZLETT, Contractor."

After this contract was read in evidence, the defendant moved the court to exclude the parol evidence that had been given by the witness, LaBarge. The court overruled this motion, and defendant excepted. This was all the evidence given or offered by either party. The court took the case under advisement, and afterward, while the case was being held under advisement, the defendant moved the court to open the case and grant a re-hearing, and supported this application by an affidavit of a witness, who swore that he had been deceived as to the time when the case was set for trial, and therefore, did not attend, and also made affidavit that there was no verbal contract made, as sworn to by the witness, LaBarge; that the written contract, above referred to, was all that ever was made between the parties. This motion was overruled by the court, and the defendant excepted. The court afterwards found the issue for the plaintiff, and assessed his damages at the amount claimed in the petition.

The defendant filed a motion for a new trial, upon the ground that he was surprised by the testimony of the witness,



---

Van Studdiford v. Hazlett.

---

LaBarge, and supported this motion by affidavit. But the court overruled this motion, and the defendant excepted, and the court rendered final judgment for plaintiff, which was affirmed at General Term, and the defendant has appealed to this court.

1. The main point raised by this record is whether the parol contract for subsisting the officers was inconsistent with the written contract for the transportation of the troops. The written contract for the transportation of the troops does not provide expressly, or by implication, for their subsistence during the trip. It is true that the contract price for transporting the officers is thirty dollars each for the trip; whereas the price for the men is eight dollars for each man. This no doubt resulted from the well known fact that the officers always occupy the cabin and state-rooms, and the men are confined to the deck, and carry their own bed-clothes.

It is not a simple case of taking passage on a boat, which always, with cabin passengers, implies board as part of the contract for passage. The troops are transported as a body, including officers and men, and there is no more reason for inferring that the officers were to be subsisted than the men. The contract, therefore, for the subsistence of the officers was independent of, and not inconsistent with, the written contract for the transportation of the troops.

2. The court did not err in refusing to re-open the case after it had been finally submitted on the evidence. To have pursued that course would have operated as a surprise on the plaintiff.

3. There was no error in refusing a new trial on the alleged ground of surprise. The evidence given by LaBarge, was precisely such as the issue required, and as ought to have been expected by the defendant. The plaintiff could only prove his case by the introduction of that sort of proof. Besides, even if there had been no contract for subsisting the officers, the plaintiff would have been entitled to a reasonable compensation for doing so, and there would have been an implied assumpsit on the part of the defendant to pay for such subsistence.

---

State to use Kelley, et al. v. Thornton, et al.

---

Upon the whole record, the judgment seems to be for the right party. Judgment affirmed. Judge Wagner absent; the other judges concur.

—o—

STATE OF MISSOURI to use of MARCELLA KELLEY, *et al.*, Defendant in Error, vs. JOHN F. THORNTON, *et al.*, Plaintiffs in Error.

1. *Administration—Practice, civil—Parties—Action on administrator's bond—Distributees may sue jointly, before order of distribution.*—Before an order of distribution is made, those entitled to distribution have a common interest in the fund, and in an action against the sureties on the administrator's bond they may properly be joined as plaintiffs to prevent a multiplicity of suits.
2. *Administrator's bond—Sureties—Distributees may maintain action before final settlement.*—Where the administrator has failed to distribute funds in his hands according to law and has been removed, where there are no debts due by the estate persons entitled to distribution may bring suit on the administrator's bond without the appointment of an administrator *de bonis non* and before a final settlement.

*Error to St. Louis Circuit Court.*

*Jecko & Hospes*, for Plaintiffs in Error.

I. Plaintiffs have no interest in common in the cause of action sued on. Each is entitled to a part of the money, in his own right, and not entitled to the entire sum jointly with the others.

II. There never having been a final settlement of the administration, and no administrator *de bonis non* having been appointed, no action will lie on the bond.

*Alex. J. P. Garesche*, for Defendants in Error.

I. Until there was an order of distribution plaintiffs had a joint interest, and that should be a sufficient answer. Moreover, suits by all prevents a multiplicity of suits. (*Oliver v. Crawford*, 18 Mo., 263; *Devore v. Pitman*, 3 Mo., 180; *State to use of Adams vs. Campbell*, 10 Mo., 726; *State to use of Collins vs. Stephenson*, 12 Mo., 181; *Dillons' Adm'r vs. Bates*,

---

State to use Kelley, et al. v. Thornton, et al.

---

39 Mo., 300; State to use of Midgett vs. Matson, 44 Mo., 305; Wagn. Stat., 1001, § 6; Lane vs. Dobyns, 11 Mo., 106.)

II. It was not necessary that there should have been a final settlement. (State to use of Ingram vs. Rankin, 4 Mo., 427; State to use of Darland vs. Porter, 9 Mo., 356; State to use of Midgett vs. Matson, 44 Mo., 305.)

ADAMS, Judge, delivered the opinion of the court.

This was an action by the relators as distributees of the estate of Michael Nolan, deceased, against the defendant as surety of Christopher J. Caffrey on his bond as administrator.

The record shows that on the 10th day of December, 1864, Michael Nolan died intestate, leaving the relators as his only heirs at law and distributees of his estate. That on the 13th day of December, 1864, the said Caffrey was appointed administrator of his estate by the St. Louis Probate Court and filed his bond in the usual form with the defendant as one of his sureties. On the 28th day of March, 1868, Caffrey made his annual settlement, from which it appeared that there was in his hands, as administrator, the sum of twenty-six hundred and fifty-five 84-100 dollars. Caffrey then left the State; and at the December Term, 1869, the Probate Court revoked his letters. No administrator *de bonis non* was appointed, and no further orders or proceedings were had in the Probate Court, either in the way of an order of distribution or of any kind.

On the 19th day of May, 1871, the relators commenced this action upon the administrator's bond, alleging as a breach, that the administrator failed and refused to pay the sum, shown by said settlement to be in his hands, to the relators. The petition alleges the foregoing facts, and also alleges, that more than two years had elapsed before the commencement of the suit and after the granting of the letters of administration; and that no debts or demands exist against the estate. The answer is a general denial. At the trial, the facts as alleged were established by the evidence, and the court gave judgment for the plaintiff. The defendant moved in arrest, which be-

---

State to use Kelley, et al. v. Thornton, et al.

---

ing overruled, he appealed to the General Term, where the judgment at Special Term was affirmed, and he has brought the case here by writ of error.

1. The first point presented for our consideration is, that the relators cannot maintain this action, because their interest is not joint, but several, in the common fund, and therefore, each must bring a separate action.

There has been no order of distribution and no separation of their respective interests in the joint fund. They therefore have a common interest in the subject matter of the suit, and it was proper they should have been joined as relators to prevent a multiplicity of suits. The State is the plaintiff, and when the fund is collected, the relators can divide it among themselves according to their respective rights therein. Whether, after an order of distribution, a several or joint suit might be maintained, it is unnecessary to decide. As there was no such order, the distributees could certainly join in the suit as relators. (See 2 Wagn. Stat., 1000, §§ 4, 6.)

2. The only remaining point raised by the defendant's counsel is, that there had been no final settlement and no administrator *de bonis non* appointed, and therefore no action will lie on the administrator's bond. This objection is not well taken. The petition and proof show that there were no debts or demands against the estate, and therefore there was no necessity for the appointment of an administrator *de bonis non*. Distributees may maintain an action on an administrator's bond before final settlement. The facts of this case show a breach of the bond, and that the distributees are the only parties entitled to the fund in the hands of the administrator; and they are therefore the only parties who can maintain the action as relators. (State *ex rel.*, Adams vs. Campbell, 10 Mo., 726; State *ex rel.*, Collins vs. Stephens, 12 Mo., 181; State *ex rel.*, Midgett vs. Matson, 44 Mo., 305; State *ex rel.*, Darland vs. Porter, 9 Mo., 356.)

Judgment affirmed; Judge Wagner absent. The other judges concur.

---

Van Studdiford v. Hazlett.

---

HENRY VAN STUDDIFORD, Trustee of PELAGIE LABARGE, Respondent, vs. HIRAM K. HAZLETT, Appellant.

1. Van Studdiford, Trustee, etc., vs. Hazlett, *ante* p. 322, affirmed.

*Appeal from St. Louis Circuit Court.*

*Frank J. Bowman*, for Appellant.

*Rankin & Hayden*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action for demurrage, charged to have occurred under the same contract for transportation of troops with supplies, that formed the basis of the action between the same parties decided at this term. A jury was waived, and the case was submitted to the court for trial, and resulted in a finding and judgment for the plaintiff, which the General Term affirmed, and the defendant has appealed to this court.

There are no questions of law in the record, except such as arose on a motion to re-open the case and hear additional evidence after it had been finally submitted to the court, and also a motion for a new trial. These motions were similar in all respects, and the affidavits in their support were also like those in the case above referred to between the same parties, decided at this term. The motions were overruled by the Circuit Court. There was no error in this ruling, (see *Van Studdiford vs. Hazlett, ante* p. 322).

Judgment affirmed. Judge Wagner absent; the other judges concur.

LIZZIE J. MESSENGER, Appellant, vs. EZRA G. MESSENGER,  
Respondent.

1. *Divorce—Desertion—Failure of husband to provide place of residence.*—The wife is bound to follow the fortunes of her husband, and live where he chooses to live and in the style and manner which he may adopt; and where a husband sues for a divorce on the ground of desertion, based on the fact that his wife remained away from him and refused his request that she should come and live with him, it is no defense, that at the time of such request he had no house to take her to, and that she was comfortably situated where she was.
2. *Divorce—Desertion—Offer to return—Must be made in good faith.*—Where suit is brought for divorce upon the ground of desertion, an offer made by defendant to live with plaintiff is not sufficient to contradict the charge of desertion, unless made in good faith for the purpose expressed, and not as a device to defeat plaintiff's action.
3. *Divorce—Infants—Care and custody.*—A divorce was granted to the father and against the mother of young female children; the mother was entirely able and competent to take care of them, and bring them up, and educate them; *Held*, that although the law generally gives the father the care of such children, they should properly be left with the mother with a view to the best interests of the children. *Ordered*, that the mother should have the care and custody of the children until the further orders of the court.

*Appeal from St. Louis Circuit Court.*

*P. E. Bland, with whom were T. A. & H. M. Post, for Appellant.*

I. In Jan. 1868, the defendant had taken the plaintiff to the house of Mr. Bliss at Nokomis, Ill., and that had become their home. On the 28th of Jan., of that year, he willfully and intentionally deserted her there. Her friends, the Blissesses, gave her there a home, comfort, sympathy and assistance. She was then *enciente*, and they assured her not only of a home, but of their assistance and protection during the trying period of her coming perils of child bearing.

Defendant was then, and continued to be, for months afterwards, destitute of means and had no home or shelter provided for her or her children. He, very shortly after leaving her, sent her requests for her to go to him, but had no means of affording her home or support, and had no home himself.

Under these circumstances, and until he provided a home to take her to and a support for her, her declining to go to him



was not without reasonable cause, nor desertion on her part. She was justified by the circumstances. (Gillenwaters vs. Gillenwaters, 28 Mo., 60; Powell vs. Powell, 29 Vt., 148-150; Bishop vs. Bishop, 6 Casey, 412; Gleason vs. Gleason, 4 Wis., 64; Hardenburg vs. Hardenburg, 14 Cal., 656; Molony vs. Molony, 2 Adams, 249.)

He remained destitute of a home and means during all of his requests for her to go to him until shortly before his renewal of these requests here in October, 1869. Hence the same rule of justification operated up to that time. Her absenting herself being justified by the circumstances—being with reasonable cause up to October, 1869, and thereafter by consent up to February or March, 1870, and there being no delinquency on her part at that time—then even if she were in the wrong from that time to her offer of Nov. 26th, 1870, no cause of action had at the date of such offer accrued to him, because such absenting was for a period less than one year.

II. No cause of action having accrued to the defendant at the time of her offer to go to him, what was the effect of that offer, his rejection of it and sending her word that he would not live with her again, followed by an invitation from him for her to go to him?

If the offer was made in good faith, his refusal to receive her constituted desertion from that date in him—that is an absenting “without her consent and without reasonable cause” and continuing for a year—a cause of action accrued to her. (1 Bush., § 786; Fellows vs. Fellows, 31 Maine, 342; English vs. English, 6 Grant (U. S., Ch.), 580; McGalvey vs. Williams, 12 John., 295; McCutcheon v. McGalvey, 11 John., 281; Hanberry vs. Hanberry, 29 Ala., 719.)

The offer was made in good faith. The legal presumption *prima facie* is of good faith—bad faith is never presumed. The presumption of good faith is consistent with all the facts and circumstances, viz:

(a.) His former destitution and present change in that respect.

(b.) The contest by *habeas corpus* over the children and its threatened renewal.

---

Messenger v. Messenger.

---

(c.) Her previous efforts and her sending the offer by a mutual friend.

(d.) His reply, conclusive and rendering any further offers hopeless.

(e.) Lastly and conclusively, the *bona fides* is established by the positive and direct testimony of the only witness speaking to the point (Mrs. Messenger)—without a shadow of conflict or contradiction or the least attempt to impeach.

III. The plaintiff being entitled to a decree of divorce, the custody of the children should also be adjudged to her on account of her fitness as relating to the comfort and lasting well being of the children, they being little girls of tender age, as to material welfare and as to moral welfare and culture.

*Lee & Adams, with whom were Davis & Smith, for Respondent.*

I. Appellant claims, that her letter of November, 26, 1870, was such an offer to return to respondent and live with him as his wife, and his not receiving her was such an absenting of himself, as gives her a cause for divorce.

Appellant's said claim is to be determined by the answer of the two following questions :

(a.) Was the letter of Nov. 26th, 1870, written by appellant in good faith for the purposes expressed in it?

(b.) Or had the respondent, by the conduct of the appellant, acquired the right to divorce as against her, prior to Nov. 26, 1870?

A negative answer to the first proposition or an affirmative answer to the second, will either of them be a bar to a decree in her favor? (1 Bishop on Marriage and Divorce, § 810, 32 Cal., 467.)

II. The letter of Nov. 26th, 1870, was not written in good faith.

Her constant refusal for two years and nine months prior to Nov. 26th, 1870, to live with respondent, as appears by the testimony; the pendency during the year 1870 of proceedings

under the Habeas Corpus Act concerning the children of the parties; the fact that the controversy between the parties had been for a long time prior to Nov. 26th, 1870, in the hands of attorneys, and in general, the bitterness of the controversy between the parties as appears from all the testimony, show conclusively, that the letter of Nov. 26th, 1870, could not express the sincere wishes of appellant. At least, respondent, considering all of these things, could well have treated that letter as he did, as a trick to lay the basis for a divorce on the part of appellant. The subsequent acts of appellant clearly show such to have been her intention. There was no renewal or pressure of her pretended offer, and no further attempt made by her, but, true to her theory, as soon as the statutory time had elapsed, she filed her petition for a divorce based on the letter of Nov. 26, 1870.

III. The respondent, by the conduct of the appellant, had acquired a right of divorce against her long prior to Nov. 26, 1870.

The appellant concedes the absenting of herself, but claims that the same was not without reasonable cause, and in justification thereof undertakes to make it appear, that respondent was at no time prior to Nov. 26, 1870, able to take care of her properly.

It is not true, that respondent was unable to take care of plaintiff; but admitting for the sake of the argument, that such was the fact, yet such does not constitute "reasonable cause" for her to absent herself. "Reasonable cause" is that, and only that, which would entitle the party so separating him or herself to a divorce. (Butler vs. Butler, [Leading case in Pa.,] 8th Law Journal, 389; Id. page 397; Eshback vs. Eshback, 23 Pa., 343; Bishop on Marriage & D. 1st Vol., § 799; Logan vs. Logan, 2 B. Mon., 142, see p. 147; Gray vs. Gray, 15 Ala., 786.)

Respondent's right of divorce, therefore, had fully accrued to him prior to Nov. 26th, 1870, to-wit: in February, 1869, and he is now entitled to a decree.

The evidence shows only overtures and negotiations looking towards a condonation, which do not bar respondent's right to a divorce. (2 Bishop on M. & Divorce, § 47; Quarles vs. Quarles, 19 Ala., 363; Perkins vs. Perkins, 6 Mass., 69; 2 Bishop on M. & Divorce, §§ 53-62.)

Condonation is conditional, the original offense is revived if the condition (of good behavior) is violated. (2 Bishop, § 53; Armstrong vs. Armstrong, 27 Ind., 186.) There can be no condonation of desertion. When the delinquent returns, the desertion is ended, it is not condonation. The respondent is therefore fully entitled to a decree of divorce.

IV. The respondent is also entitled to a decree for the custody of the two minor children. There is not a jot of evidence affecting respondent's character. He is sober, temperate and industrious, of excellent moral character. He is, both by the statute and at common law, entitled to the custody of these children. (Wagn. Stat., § 2, Ch. 66; Mercein vs. People, 25 Wend., 64; People vs. People, 19 Wend., 16; People vs. Chegary, 18 Wend., 637; Sumner vs. Lebec, 3 Greenl., 223; Commonwealth vs. Nutt, 1 Browne [Pa.], 143; Allen vs. Caster, 1 Beas., 202; Wellesley vs. Wellesley, 2 Bligh. U. S., 124; Whitefield vs. Hales, 12 Ves. 492 and note to Sumner's Edition; and there is nothing in the evidence preserved in the bill which should alter the rule of the Common Law.) This is not a case for any exercise of discretion, as nothing appears to change the general rule as to custody.

NAPTON, Judge, delivered the opinion of the court.

This is a suit for a divorce, instituted in February, 1872, by the wife against the husband, on the grounds of desertion, without a reasonable cause, for the space of one year, and of such cruel and barbarous treatment, on the part of her husband, as to endanger her life; and, for the further cause, that the defendant had offered such indignities to her as rendered her condition intolerable.

The defendant denied all the allegations of the petition, and, asserting that his wife had deserted him, asks for a divorce on this ground.

The circuit court refused to grant either party a divorce, and the judgment is appealed from by both parties.

In regard to the charge of cruelty and indignities made in the petition, nothing has been said in the argument here, it being conceded that the evidence does not sustain either of these charges, and the only ground relied on by the plaintiff or defendant is the alleged desertion.

The facts in regard to the question seem to be very clear and scarcely disputable. The marriage took place in this city in 1865, the plaintiff having previously been a teacher in the public schools for several years, and the defendant being then engaged in business in New Orleans, apparently a prosperous one, yielding him an income of \$8,000 a year. Immediately after the marriage, the parties to it, together with the mother of the plaintiff, who was without means, and dependent on her daughter for support, went to New Orleans, and there continued to live until 1868, about which time the defendant failed in business and became a bankrupt. In the meantime, one child, a daughter, had been born, and the mother of the plaintiff had been furnished by the defendant with the means of making a visit to St. Louis, but had returned about the time of the birth of her daughter's first-born. It seems from the evidence of both plaintiff and defendant, that during the residence in New Orleans there was some disturbance of that mutual confidence which the marital relation assumes, and which is seldom, if ever, destroyed, where it is based upon a mutual attachment. It is unnecessary to state the details of these controversies as they have no bearing upon the question of desertion. They merely show, that at the time of their leaving New Orleans, their domestic happiness was not without alloy.

In 1868, after the bankruptcy of the defendant, the plaintiff and defendant went to Illinois on a visit to the house of a friend of the wife, a Mr. Bliss, whose wife was an old acquaintance and friend of Mrs. Messenger, and who was thought to have it in his power to give the defendant, Messenger, some aid in procuring him a means of support. Mr. Bliss

---

Messenger v. Messenger.

---

did propose to give Messenger a farm in the neighborhood, of which he had control, but accompanied his offer with a proviso that Messenger should treat his wife more kindly than he had done. Messenger, the defendant, declined the proposal, and came down to St. Louis to seek employment.

From this place he wrote repeated letters to his wife, begging her to come down and live with him, but she declined. The excuse alleged was that Messenger, the husband, had no house in St. Louis, and that she was expecting to be confined, and that she was comfortably provided for where she was.

After the birth of her second child, the plaintiff came to St. Louis and found employment as a teacher in the public schools at a salary sufficient to support herself, her mother and her children. The defendant visited her and again begged her to live with him, but she persistently declined.

Finally, in November, 1869, the plaintiff agreed to live with defendant if he would pay certain debts of hers, and he did pay a portion of them, but in February, 1870, she retracted and refused to live with him.

After a controversy had arisen in the courts here in regard to the custody of the children, Mrs. Messenger wrote a letter to her husband offering to live with him, but Mr. Messenger treated the letter as a device to prevent the intended suit for divorce, and therefore paid no attention to it, returning no answer, except verbally.

Upon these facts, about which there is no dispute, it is perfectly clear that the plaintiff has no claim for divorce on the ground of desertion.

There is no evidence of any desertion, unless we adopt the opinion, that the wife has the right to dictate to her husband where he shall live and what employment he shall assume, and that the poverty of the husband is a valid excuse to the wife for declining to live with him. We have never understood the marital relation in this way. We have supposed it was the duty of the wife to live with her husband and abide by his fortunes in sickness and health, in poverty and riches, to make his will her law, where it is not in conflict with the law of God.



The humiliating proposal of Mr. Bliss was properly declined.

There is no ground whatever for a divorce on the part of the plaintiff, but there is very clear evidence that the defendant is entitled to a divorce on the ground of his wife's desertion of him for more than one year. The letter of November 26, 1870, is plainly the result of a scheme to prevent a suit by defendant, and so it was regarded by Judge Woerner, who was the referee in the case.

It is clear that the plaintiff has for five years persistently declined to live with her husband. Whether he had the means of providing her with an establishment suited to her views, is, in our opinion, of no importance.

The case of *Gillinwaters vs. Gillinwaters*, 28 Mo., 61, is relied on to show that the husband must offer the wife a suitable residence in order to require her to return, but that was a case in which the husband was seeking a divorce on the ground of desertion, and Judge Scott, who was very much opposed to divorces, was impressed with the idea that the husband who sought the divorce, brought about the condition of affairs which required the wife's absence. He observes, that the "disposition of his property seems to have been made with a view to effect the very object he has attained and of which he now complains, and for which he would have a divorce." He observes, finally, "It is clear that the plaintiff was as anxious for a separation as the defendant, and the little arts he practiced in the hope of keeping the law on his side, serve only to evince his real desire."

So in this case, the "little arts" practiced by plaintiff clearly evince a determination not to submit to the marital rights of her husband. We have no idea that Judge Scott ever imagined that a wife had a right to desert her husband because he was poor and unable to keep up an establishment commensurate with her views and expectations; she is bound to stand by him to the last, through all the changes of fortune, as he is by her.

Mrs. Messenger, the plaintiff, seems to have entertained a very different opinion in relation to the obligations she assumed; she seems to have been of opinion, that her husband was under obligations to afford her such a home and house as his circumstances at the time of the marriage enabled him to do, and that when he ceased to do so, she was under no obligations to follow his adverse fortunes; that if her friends would better provide for her, she might desert him and fall back upon the bounty of her friends or upon her own resources.

We think this is a mistaken view of the relation of husband and wife. The opinion is of course based on the hypothesis, that there was no such abuse of the marital relations, by cruelty or indignities, as justified a separation. The question is one of desertion, and we hold that the wife is bound to follow the fortunes of her husband, and to live where he chooses to live, and in the style and manner which he may adopt, and such will be the determination of a wife who is devoted to her husband, and who does not assume to be wiser than he is.

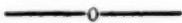
It being conceded in this case, that the charges of cruelty and indignities to the person are abandoned as groundless, and the case being rested on the sole ground of desertion, we are clearly of opinion that the desertion was on the part of the plaintiff. The letters between the parties are quite conclusive on this point. Those of the wife are excessively cold, and amid all variations are the expression of the same uniform determination, which was that she would live with her husband whenever he could make it to her interest financially to do so, but not until then, while those of the defendant indicate an affection which seems not to have been reciprocated.

We think the defendant is entitled to a divorce under our statutes, on the ground of wife's desertion. The case will, therefore, be remanded with a view to such decree.

In regard to the children, we have great objections to depriving the mother of the control of infant children, especially

when they are females and when the mother is entirely competent and peculiarly adapted to bring up and educate them; and although the law gives the father the custody of such children generally, we think the decree directed in favor of the defendant should be so framed as to continue the care and custody of the children in the plaintiff, subject, however, to any subsequent order of the court. The restrictions against marriage should be removed so far as plaintiff is concerned.

The judgment is reversed and the cause remanded, with instructions to enter a decree in conformity with this opinion. All the judges concur.



HENRY BURHAM, Respondent, vs. ST. LOUIS & I. M. RAILROAD Co., Appellant.

1. *Railroads—Damages—Negligence, contributory.*—Although one injured by a railroad collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet if the accident was directly caused by negligence of the company, the latter will be liable.
2. *Practice, civil—Jury—Evidence.*—In civil law cases, the jury must determine the weight of evidence.

*Appeal from St. Louis Circuit Court.*

*Dryden & Dryden*, for Appellant.

*J. N. Straat*, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This suit was brought to recover damages for injuries alleged by plaintiff to have resulted from the negligence of defendant's employees, in coming in collision with plaintiff's wagon whilst crossing the track of defendant's railroad. The plaintiff was driving his wagon down Fillmore Street in Carondelet, or South St. Louis, towards the river, and when partly on the track of the railroad, the locomotive, which was

going at considerable speed, struck the wagon, destroyed it, and inflicted very serious wounds on the plaintiff, disabling him, to some extent, for life.

The only question in the case, was one of negligence or want of care on the part of the defendant, or contributory negligence on the part of the plaintiff, directly leading to the collision.

The court gave two instructions for the plaintiff:

"1. If the jury find from the evidence that the plaintiff was injured while attempting to cross the track of the defendant, as stated in his petition, and that such injury was caused by the carelessness, negligence, or recklessness of the servants, agents and employees of the defendant, in conducting, managing and running the locomotive engine and cars attached thereto, without any fault, misconduct or negligence on the part of the plaintiff, directly contributing thereto, then they must find for the plaintiff."

"2. The jury are instructed, that although the plaintiff may have failed to exercise ordinary care and prudence, while attempting to cross the track of defendant, as stated in his petition—which may have contributed remotely to the injury complained of—yet if the agents, servants and employees of the defendant were guilty of negligence, carelessness or recklessness, in conducting, running and managing the locomotive engine and cars thereto attached, which was the direct and immediate cause of the injury, and might have prevented it—the injury—by the exercise of ordinary prudence and care, the defendant is liable."

The third instruction relates the rule of damages, and no objection being made to it, is not inserted.

For the defendant, the court gave the following instructions:

"1. That the defendant had the lawful right to run its locomotives and cars on and along its railroad track; and although the jury may believe from the evidence in the cause, that a train of defendant's cars, running on said railroad, collided with a wagon on which the plaintiff was seated, and injured him,

yet if they further believe from the evidence, that said injury happened by accident, and not by reason of any negligence or want of care of the agents and employees of defendant, in charge of said train, the verdict of the jury should be for the defendant."

"2. If the jury believe from the evidence, that just before the happening of the collision between the train and the team spoken of by the witnesses, and before said team had been put across said defendant's railroad track, the plaintiff knew, or by the exercise of reasonable care and attention, might have known, that defendant's said locomotive and cars were then so near at hand and approaching him, that an attempt to cross said track in front of the same would be plainly dangerous and hazardous, and that plaintiff did yet, nevertheless, attempt to drive said team across said track in front of said approaching locomotive and cars, and that the said attempt of plaintiff to drive across said track, directly contributed to produce the injuries complained of by plaintiff, then they must find for defendant."

"3. The court further instructs the jury, that although they may believe that the negligence or want of care of the agents and servants of the defendant contributed to the happening of the injury complained of, yet if they shall further believe from the evidence, that the plaintiff was likewise guilty of negligence or want of care, which directly contributed to produce said injury, the verdict must be for the defendant."

"4. The jury are further instructed that they are not justified in finding against defendant, from the mere fact that the plaintiff received the injury complained of, but before they can so find, they must believe from the evidence in the cause, that such injury happened by reason of the negligence or want of proper care of the agents and servants of the defendant, and without any negligence, or want of care on the part of the plaintiff, directly contributing to such injury."

"5. The jury are further instructed that if they believe from the evidence in the cause that the injury complained of, happened wholly by reason of the negligence or recklessness of

the plaintiff, the verdict of the jury should be for the defendant."

"6. The law does not prescribe any limits to the speed at which engines or cars may be run in towns or cities in this State."

The evidence in this case established that from Elwood street to Fillmore street, the distance was about 300 feet, and that about ten steps above Elwood street, the train would come in sight to a person on Fillmore street—that upon this occasion, the train was an express train, and did not stop at the station near the foot of Elwood street. The witnesses are not agreed as to the rapidity with which the train was moving—nor do they agree as to whether the bell was rung—but they do agree that the whistle was sounded three times after turning the point at Miller's house, just above Elwood street. The plaintiff states that his wagon, when he first saw this train, was partly over the track, with the fore-wheels between the rails—that he never heard any bell—and when he saw the locomotive, he whipped up his mules, but by reason of the elevation of the east rail, he could not get over in time before the locomotive struck the wagon. He describes the train as moving with great rapidity—he could not back on account of the depression of the ground between the rails.

On the contrary, some of the plaintiff's witnesses stated that the plaintiff was on the west side of the track when the train came in sight, and the first whistle sounded—that by remaining where he was, the accident might have been avoided—that the plaintiff seemed to have lost his presence of mind, and attempted, with whip and reins, to drive his mules over ahead of the locomotive.

The evidence is very conflicting, but the jury found a verdict for the plaintiff.

It is plain that there was some evidence of negligence on the part of the defendant, contributing directly to the disaster. That the crossing was not in proper order for convenient or rapid transit of wagons, was in proof, and whether it was so or not, was properly submitted to the jury.



The instructions presented the case very fairly. All those asked by the defendant were given, and those given for the plaintiff were undoubted law—and the only objection made here, is to the second instruction—not on account of the principle of law which it is conceded it was intended to assert—but on account of its phraseology not being sufficiently definite and clear, so as to exclude the possibility of its being construed to impose diligence on the defendant's agents before they became aware of the situation of plaintiff and his wagon. But we think this is a necessary implication, and the instruction would not have been understood otherwise, especially when accompanied with the six pointed and plain instructions given for the defendant. The jury must have found, under this instruction, that after the defendant's agents had become aware of the dangerous situation of plaintiff's wagon, it was still in the power of the managers of the train, by putting down the brakes, or reversing the engine, or by some other mode, to have prevented the collision. Of course they could not prevent an injury of this sort by any amount of care and prudence, if they never saw the plaintiff's wagon, or could not, by ordinary precaution, have seen it, until it was too late; and this instruction merely requires ordinary care and prudence in the prevention of the disaster, originating through the imprudence of the plaintiff in driving his wagon on the track at such a time, when he knew a train was expected; and the question of the knowledge of the conductors of the train, or of their opportunities of knowledge of the plaintiff's situation, necessarily entered into the question of prudence and care, or its opposite, of negligence, recklessness and want of care. This point might have been defined more distinctly in the instruction, but the instruction corresponds with, and is consistent with, all the instructions asked for and given by the court for the defendant—which are not more definite on this specific point, than the one given for the plaintiff.

The only substantial objection to the verdict is, that it is against the weight of evidence, and this point having been

passed on by the court where the trial was had, is no longer one which this court has any control over.

Judgment affirmed; the other judges concur.

---

JAMES C. MOORE, Assignee of EDWARD P. TESSON, Appellant,  
*vs.* THE ATLANTIC MUTUAL INSURANCE COMPANY, Respondent.

1. *Fire insurance—Delivery—Agency.*—Delivery of plats of a building proposed to be insured to the agent of an insurance company, held delivery to the company.

*Appeal from St. Louis Circuit Court.*

*James Tausig*, for Appellant.

*B. A. Hill*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a policy of insurance, issued by the defendant, to Edward P. Tesson, who originally brought the suit, and becoming bankrupt, it was afterwards prosecuted in the name of the plaintiff as assignee in bankruptcy.

The case has been here before, (40 Mo., 36, and 50 Mo., 112,) and for a more detailed statement, reference may be had to 50 Mo., 112. The written application for insurance which was signed by the agent of Tesson reads as follows: "\$5,000 fire insurance wanted for six months on a three or four story brick distillery and machinery, not running; no fire about it; situated entirely detached (nearest building being an office say 100 yards); on the bank of the Mackinaw river, in the town of Forneyville, Woodford county, Illinois, valued at \$32,000, privilege of \$5,000, other insurance. December 16, 1858. Gable end is frame.

Ed. P. Tesson,

per L. E. Suber, Attorney in fact."

Brought a letter from Tesson—no plat.

When the application was signed, the agents of both parties were ignorant of the situation of the buildings, and the materials of which they were composed. Certain plats of the premises with their surroundings were at the office of Tesson's agent, which showed that the distillery building was not built of brick, but that the third story was built entirely of wood, and a portion of the distillery building, one story high, sixty feet long and thirty feet wide, was built entirely of wood, &c. On the part of the plaintiff, it was alleged that these plats were to be delivered to defendant's agent as a modification of the written application, and that they were so delivered before the policy was issued to Tesson. On the other hand the defendant denied that such plats were referred to, and denied that any such plats were ever delivered to defendant's agent as alleged. The question whether the plats in dispute were delivered to the agent of the defendant as a modification of the written application, before the policy finally took effect, was the only material issue, and on this issue the evidence was contradictory. The evidence on both sides tended to establish their respective views.

On the part of the plaintiff the court instructed the jury as follows:

"If the jury find from the evidence that said Tesson at the issuing of said policy owned but one distillery at the place named therein, and prior to issuing said policy, said Tesson telegraphed from Peoria, Illinois, to his agent to insure said distillery; that said agent made the application, but stated to defendant's agent that he did not know the description was accurate, and he would bring said plats from his office—from which the description in the application could be made accurate—and he did leave said plats with defendant's agent at defendant's office before the issuing of the policy, and the said plats and the statements were sufficient to fully inform defendant of the form and structure of said distillery and machinery, and materials of which said distillery was composed; and the premium paid for said insurance was reasonably sufficient for insuring the property as represented by said

plats; and defendant was not deceived as to the nature of the property insured; and the same was destroyed by fire, about May 13th, 1859, and notice and proof of loss were made to defendant as set forth in the petition, the jury must find for plaintiff."

On the part of the defendant the court instructed as follows:

1. "If the jury find from the evidence that the plaintiff's agent Suber in applying for insurance did not disclose the existence of a wooden distillery building adjoining the main distillery building, or the existence of a wooden third story and attic on a brick distillery building containing a grist mill; and if the jury further find that said facts, or either of them were material to the risk, or would, if disclosed by said Suber, have caused a higher rate of premium to be asked in the usual rating risks than would have been asked as a premium on such a building as the one described in the application and policy, then the jury will find a verdict for the defendant."

2. "The plats offered in evidence by the plaintiff in this case cannot be regarded by the jury as any part of the written application for insurance, unless said plats were made a part of said application at the time it was made, or were produced and delivered to the company through the secretary or some agent or officer of the defendant, as a part of said application, before the policy sued on was issued or delivered."

The jury found a verdict for the defendant. The plaintiff filed a motion for a new trial which was overruled, and final judgment rendered in favor of defendant, which was affirmed by the General Term, and the plaintiff has appealed to this court.

It is manifest from this record that the whole controversy turned upon the question, whether the plats, which showed the real condition of the buildings insured and the materials of which they were composed, were in fact delivered to the agent of the defendant before the policy finally took effect. There is nothing in the case to warrant the conclusion that the agent of defendant had any knowledge or information in

regard to these buildings, except what he derived from the written application as made, or as it may have been modified by a subsequent delivery of the plats.

And therefore if the plats were not delivered, that would have amounted to a concealment of the actual condition of the buildings, and the materials of which they were composed. The first instruction for defendant was based upon this view of the case, and considered in this light, it placed the case properly before the jury.

The defendant had the right to fix its own rate of premiums for insurance. The question was not whether the rate charged for this particular risk was as much as would ordinarily have been charged, or ought to have been charged for the buildings as they stood on the ground, but whether this company would have taken the risk at the price charged, if the bargain had been for the insurance of the buildings as they really existed.

In my judgment this question was fairly put to the jury in the instructions given for the plaintiff; and the first instruction given for the defendant was not contradictory, but maintained the same view as the plaintiff's in this respect. The question was whether the defendant intended to insure the buildings as they really stood on the ground, and as they were shown to exist by the plats; or whether the company was deceived by the non-production of the plats, and induced thereby to accept the risk at a less rate than it would have otherwise charged.

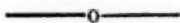
The jury found this issue for the defendant, and that the plats not disclosed were material to the risk.

It is urged here that the instructions were contradictory in regard to the delivery of the plats, the plaintiff requiring a delivery to the agent of the company, and the defendant to the company "through its secretary or some agent or other officer."

This distinction seems to be in the nature of a refined criticism on words, and not a substantial difference.

A corporation can only act by and through its agents. An agent acting for an insurance corporation must stand for the corporation itself; and therefore a delivery of the plats to the agent of the company was in effect a delivery to the company through the agent.

I find no substantial error in the record. Judgment affirmed. All the judges concur.



GEORGE DEBAUN, Respondent, *vs.* ADALINE H. VAN WAGONER, *et al.*, Appellants.

1. *Married women—Contracts—Separate estate.*—It is the well settled law of this State, that if a married woman, who is possessed of real estate for her sole use, execute a promissory note, it will be presumed that she intended to charge her separate property with the payment thereof. And it is not necessary that the instrument which she executes, whereby she promises to pay a sum of money, should assume the shape of a promissory note. Her intention to bind her separate estate will, in the absence of anything to the contrary, accompany the act as well in one case as the other. In the contemplation of equity a married woman is as completely clothed, so far as her separate property is concerned, with the *jus disponendi*, as any other property owner.

*Appeal from St. Louis Circuit Court.*

*Melville Smith*, for Appellants.

It does not appear that appellant intended to bind her separate estate. It clearly appears that she did not.

I. She cannot charge her property, except when the intention so to do is clear and unequivocal, and only then where the contract is for her personal benefit or advantage, or for the benefit or advantage of her separate property. She cannot encumber her separate estate for the debt of another (*Kimm vs. Weippert*, 46 Mo., 532; *Hartman vs. Ogborn* 54 Penn. St., 120; *Lawrence vs. Finch*, 2 Green [N. J.] 234; *Smith vs. Allen*, 1 Lans. [N. Y.,] 101; *Kantrowitz vs. Prather*, 31 Ind., 92; *Yale vs. Dederer*, 18 N. Y., 265; 22 N. Y., 450.)



---

DeBaun v. Van Wagoner, et al.

---

II. The contract must show its purpose and intention. The intent must be a part of the contract, and appear from a just interpretation—parol evidence not competent. (Kimm vs. Weippert, 46 Mo., 532.) The acts and declarations of a married woman in order to charge her separate estate should be clear and unequivocal. (Lawrence vs. Finch, 2 Green [N. J.], 234.)

III. A married woman cannot incumber her separate estate for the debt of another. (Hartman vs. Ogborn, 54 Penn. St., 120; Yale vs. Dederer, 18 N. Y., 265; Kimm vs. Weippert, 46 Mo., 532.)

*H. D. Laughlin, with whom was Arba N. Crane*, for Respondent, relied upon Coats vs. Robinson, 10 Mo., 757; Miller vs. Brown, 47 Mo., 504

SHERWOOD, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in equity, to subject the separate estate of a married woman to sale. The petition in substance alleges: That Mrs. Van Wagoner was possessed of certain real estate, situate in the city of St. Louis, to and for her sole use; that John M. Krum was the trustee, in whom was vested, for the exclusive benefit of Mrs. Van Wagoner, the legal title to said estate; that said *cestui que trust* claimed an interest in certain leasehold property, and, as an inducement to plaintiff to purchase the same, promised in writing that, if he would do so, she would pay the taxes on said last named property for the year 1861, and all years prior thereto; that, relying on such promise, plaintiff made the purchase, but defendant failed and refused to pay said taxes in accordance with her said agreement, and plaintiff in consequence was compelled to pay the taxes for a number of those prior years, inclusive of 1861, on the property thus purchased; that defendant did by her said promise in writing set apart and pledge her separate estate for the payment of the sum which plaintiff had been compelled to pay in satisfaction of such taxes. The petition concludes with a prayer for the sub-

jection of the separate property of the *cestui que trust* to the payment of the amount so as aforesaid expended, and for other relief.

The defendants demurred to this petition, assigning a number of grounds, which were all in reality comprehended in the first ground assigned, that the petition did not state facts sufficient to constitute a cause of action.

The court overruled the demurrer, and, the defendants declining to plead further, judgment went as prayed in the petition, and this cause is here on appeal.

It is the well settled law in this State, that if a married woman, who is possessed of real estate for her sole use, executes a promissory note, it will be presumed that she intended to charge her separate property with the payment thereof; for, unless such presumption should prevail, her act of executing the note would be altogether without meaning. And it makes no difference in point of principle, that the instrument which she executes, and whereby she promises to pay a sum of money, does not assume the shape of a note of hand. Her intention to bind her separate estate will, in the absence of anything to the contrary, accompany her act, as well in the one case as the other. The power of a *feme covert* to charge her separate property is an inevitable sequence of the doctrine of courts of equity, that in respect to such property she is a *feme sole*. Hence it follows, that in contemplation of equity a married woman is as completely clothed, so far as regards her separate estate, with the *jus disponendi* as any other property owner. The petition in this case expressly alleges, that she intended by her written instrument to bind her separate estate, and this allegation as well as the other statements of the petition the demurrer confesses to be true.

The judgment is affirmed. The other judges concur.

---

St. Louis, to use Bruennell v. Bressler.

---

CITY OF ST. LOUIS to use of HENRY BRUENNEL, Respondent,  
vs. VALENTINE BRESSLER, Appellant.

1. *Practice, civil—Conflict of evidence.*—In civil law cases, questions of conflicting evidence will not be reviewed by the Supreme Court.
2. *Special tax bills—Judgment on, should be special.*—Judgments in suits upon special tax bills should be special—against the property charged with the lien—and not a personal or general one.

*Appeal from St. Louis Circuit Court.*

M. L. Grey, for Appellant.

F. & L. Gottschalk, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Action on a special tax bill (instituted before a justice of the peace,) for the construction of a sewer in Arsenal street sewer District, No. 1. The contract in this case, on which the tax bill is based, was entered into July 30, 1868, under Ordinance No. 6607, (approved July 3, of that year,) to establish the above mentioned district, and to provide for the construction of sewers therein. This ordinance having failed to give the dimensions of the sewer to be thus constructed, Ordinance No. 6854 was approved March 23, 1869, to remedy the defect, and supply the omission. And the chief controversy in the case was, as to whether the work under the contract was completed prior, or subsequent, to the passage of the last named ordinance. As on this point there was conflicting evidence, the matter is not open to review here. It was a question of fact, not of law, and as the court, sitting as a jury, found for Bruennell, to whose use this suit is brought, the finding was evidently based on the theory contended for by plaintiff, that the amendatory ordinance, prescribing the dimensions of the sewers, was passed prior to the completion of the work,—so that, even if the declarations of law, asked by defendant and refused by the court, were entirely unexceptionable, it is not perceived that such refusal operated to his prejudice. And the evidence was conflicting also, as to whether the defendant's lot had a front of 50, or only of 41,

feet, and the court found in favor of the measurements certified by the city engineer. I am unable to discover any error in the record, save as to the form of the judgment, which should have been only a special one against the property chargeable with the lien.

In so far as the judgment is a personal and general one, it will be reversed, and that portion of it which is special, and is to be enforced against the property alone, will be affirmed. All the judges concur.

— 0 —

MARY NORTON Plaintiff in Error, *vs.* MARTIN ITTNER, *et al.*,  
Defendants in Error.

1. *Negligence—Question for jury, when.*—In many cases where the facts are undisputed, the question of negligence is one of law to be passed upon by the court, but, where they are disputed or admit of different constructions or inferences, the question should be left to the jury.

*Error to St. Louis Circuit Court.*

A. J. P. Garesche, for Plaintiff in Error.

H. D. Laughlin, for Defendants in Error.

NAPRON, Judge, delivered the opinion of the court.

We are of opinion that the evidence in this case was sufficient to take the case to the jury.

The deceased was a hod carrier in the employment of defendants, and was killed whilst crossing a gangway, constructed by the defendants or their agents, from the third story of one house to the third story of another. This gangway, which was forty feet from the ground, was originally a very secure one, constructed of joists with plank on the top, and wide enough and strong enough to enable the carriers of mortar and brick to pass over safely. On the day of the accident, whilst the hod carriers were at dinner, the carpenters having use for these joists removed them and substituted two planks,

one an old "header," and the other a pine board. Crane, who was a witness in the case, was the first of the workmen to undertake the passage of this new gangway, but, as he stepped on the board, he heard it crack, and then, apprehending its insufficiency as a support, he doubled the plank, or placed the board over the "header," and thus walked over safely. On his return he met the gang, at the head of which was Norton (the deceased), and heard the supervisor or foreman call out "Hurry men, Hurry!"—and he halloed to the men—"watch out boys—that's a dangerous place." Norton, who was ahead and supposing the danger referred to was the width of the platform (which was only 9 inches), restored the two planks to their former position, side by side, and stepping on the board, which had a knot in the middle, was precipitated to the ground and killed.

There is no doubt that negligence is in many cases a question of law to be determined from the facts agreed or found by a jury;—but where the facts are disputed, or the undisputed facts admit of different constructions and inferences, the court may properly leave the matter to the jury, and so this court held in *Wyatt vs. Citizens Railw. Co.*, 55 Mo., 485; and such is the recent decision of the Supreme Court of the United States in *Sionk City & Pa. R. R. Co. vs. Stout*, reported in *Central L. J.* No. 17. Negligence may be asserted as a matter of law, where there has been a breach of law, or a city ordinance, as in *Karle vs. K. C., St. Jo. & C. B. R. R. Co.*, (55 Mo., 476.) But where the facts in evidence may, in the judgment of sensible men, lead to very different conclusions as to whether they establish want of care or contributory negligence, the jury is the tribunal selected to determine the question. Therefore this court held, in the cases above referred to, that though a court might very properly declare as a matter of law, that, if one voluntarily jumps from a train of railroad cars in motion, the act is necessarily attended with such risks as to throw all the responsibility of the result on the actor; yet, at the same time where a young man jumped from a street car, drawn by horses, though the car was in

rapid motion, at the instance of the conductor who refused to stop the car, it was error for the court that tried the case to pronounce it negligence *per se*, and that it should have been left to the jury to say, whether under the circumstances it was negligence or not on the part of the passenger. The question of negligence depends on the circumstances of each case.

In the present case there was a double risk, between which the deceased was called upon suddenly to decide, and he unfortunately selected the most dangerous. He might have understood the warning of Crane (the witness), as directed to the narrowness of the gangway, and so understanding the warning, would naturally attempt to remove this danger by separating the two planks. Whether his doing so was an act of negligence, was a matter of inference from the facts which ought to have been left to the jury. It was undoubtedly the duty of the defendants to furnish their workmen a safe way of transit from one house to another at such a height above ground, and whether the gangway, as it was found after the workmen returned from dinner, was composed of two planks, laid side by side, or of one plank on the top of the other, it is not impossible that sensible men might regard it, in either form, as unsafe, and not prepared with a proper regard for the lives of those who had to pass over it.

We have not been able to perceive the motive of plaintiff in reading the defendant's answer as evidence—but this does not alter the character of the question before this court. It was offered as evidence, and what weight it was entitled to was not a matter of law for the court.

We shall set aside the non-suit and reverse the judgment for a trial. The other judges concur, except Judge Adams.

Dissenting opinion by Judge ADAMS.

This was an action by plaintiff to recover of defendants damages for the loss of her husband, whose death was alleged to have been occasioned by their negligence whilst he was in their service.



The defendants were the contractors for certain brick buildings, and the plaintiff's husband acted as one of their hodmen in carrying brick and mortar to the brick-masons. In crossing on a staging forty feet high, a piece of plank with a knot hole in it broke at the hole, and the deceased fell to the ground, which occasioned his death. The issues raised by the pleadings were negligence on the part of defendants, and contributory negligence on the part of the deceased.

The court instructed the jury, that upon the case, as made by the plaintiff, she was not entitled to recover. The plaintiff took a non-suit with leave to move to set it aside, which motion was made and overruled, and a final judgment rendered in favor of defendants, which was affirmed at General Term.

The only material evidence bearing on the issues was as follows:

William Crane testified: "I am a laborer; know the defendants; they constitute the firm of Ittner Brothers; I was at work for them as a laborer when this accident happened. I knew the deceased, John Norton; we had had a good scaffolding of two good planks, joists which lying side by side made a walk about twenty-eight inches wide, but they had been removed while we were at dinner. In their places had been put an old header and a pine plank, I don't know by whom. The joists had been taken by the carpenters who needed them in the building. I was the first to pass over these new ones, and as I stepped on it they were lying side by side, and I heard one of them crack, so I doubled them, putting one on top of the other; and this left a gangway about nine inches wide, about forty feet from the ground. There was no guard to it. It required care because it was so narrow. I then crossed over it; afterwards returned, and just as I got inside I met the gang coming which Norton was leading. I didn't stop, as some one just at the moment halloed "hurry, men! hurry!" when I went past them shouting "look out, boys! that's a dangerous place." I meant by its width, but gave no explanation of what I meant—said nothing else than just to look out because it was a dangerous place. Norton opened the planks and laid

them side by side, and the plank broke—he fell and was killed. I believe they were strong enough double, but not single, because the pine blank was unsound. The walk was dangerous because so narrow, but a man could safely pass over it, exercising care, as I proved myself, because I crossed it going and coming. The gangway was built by men under the orders of the boss, as I supposed. I have been a laborer for the past eighteen years, and for the last six or seven in this city. I have never known the laborers to furnish the plank, and supposed it was the business of the boss to do it.”

Plaintiff also read in evidence original answer of defendants, in these words:

“Mary Norton, Plaintiff, vs. Martin Ittner, John Ittner and Anthony Ittner, Defendants. In the Circuit Court of St. Louis county. October Term, 1870.

Defendants for answer, come and aver that they have no sufficient knowledge or information to form a belief if plaintiff was the lawful wife of John Norton, deceased.

They deny that they constructed the staging mentioned in the petition, or that they had anything to do with the construction thereof, but they admit that a staging was constructed at the building specified by the employees of defendants, whose duty it was to use the same in carrying materials to be used in the erection of said building, of whom the said Norton was one, and whose duty it was to see that the same was perfect and secure before using the same. They aver, that, after said staging had been constructed and used, the said Norton altered and changed the same, that, if it was unsafe and insecure, such alteration and changing so made it, that such alteration and changing caused the accident that resulted in the death of said Norton, and that he did not exercise due care and caution in the premises. They deny that they constructed said staging so carelessly, negligently and insecurely, that said John Norton, while in the usual course of his employment, and where he might lawfully be, fell through said staging without any fault on his part, and was precipitated from the height of seventy feet, or that their em-

ployees so did except the said Norton. They deny that the death of said Norton resulted from, and was occasioned by, any neglect or default of these defendants, or from any neglect or default of their agents, servants or employees in the construction of said staging, for which they are responsible, or by reason of any other neglect or default for which they can be held responsible, but they aver that the want of proper care and caution on the part of said Norton contributed to and caused his death. They deny that by the provisions of any statute they forfeited and became liable to pay the plaintiff the sum of five thousand dollars, or any other sum. Therefore they ask judgment to go hence with their costs.

By C. G. Mauro & Laughlin, their attorneys."

It is very obvious from this statement that the plaintiff had no standing in court. It is manifest that the death of her husband was occasioned by his own immediate act in separating the planks which formed the staging, and walking on the unsound plank. If it was not his business to see that the staging was all right, he certainly had no authority to alter it, and thus render it still more dangerous.

But the answer of the defendants to the original petition, which was read in evidence by the plaintiff without objection, settles this controversy. Whether a pleading can be read as evidence, if objected to, it is unnecessary to consider. For the present inquiry it is sufficient, that this answer was read as evidence without objection, and must be taken as a part of the plaintiff's case. It proves that the defendants were without fault, and that the deceased was the proximate and immediate cause of his own death.

In my opinion this judgment ought to be affirmed.

---

Cabanne, et al. v. Skinker, Ex'r Forsyth, et al.

---

JOSEPH CHARLESS CABANNE, *et al.*, Plaintiffs in Error, *vs.* T. K. SKINKER, Ex'r of ROBERT FORSYTH, *et al.*, Defendants in Error.

1. *Wills—Extra-territorial operations of—Responsibility of executor.*—So far as realty is concerned, a will has no extra-territorial force, and the executor cannot sue for, or in anywise intermeddle with, property of his testator, real or personal, in another State, unless the will be there proven, or the laws of such States, dispensing with the probate anew, confer the requisite jurisdiction; and hence, where no such provisions prevail, he cannot be held liable, on his bond as executor, for his acts done in another State. Whether he might not be chargeable as trustee for misapplication of funds received in another State, not passed on by the court.

*Error to St. Louis Circuit Court.*

C. C. Whittlesey, and R. H. Spencer, for Plaintiffs in Error.

I. If an executor or administrator receive assets from abroad, he and his sureties are liable for the same. (Pipkin *vs.* Casey, 13 Mo., 349; Pratt *vs.* Northam, 5 Mass., 95; Shultz *vs.* Pulver, 3 Paige Ch., 182; S. C. on appeal affirmed, 11 Wend., 361; Lyman *vs.* Parsons, 20 N. Y., 103; Collins *vs.* Bankhead, 1 Strob., 25; Judge Probate *vs.* Heydock, 8 N. H., 491; Dowdall's case, 6 Coke., 48; Williams *vs.* Storrs, 6 Jurist Ch., 363; Doolittle *vs.* Lewis, 7 Jurist Ch., 45; Sto. Conf. L., § 518; Trecothick *vs.* Austin, 4 Mass., 33; Vroom *vs.* Van Horne, 10 Paige Ch., 549; Sherwood *vs.* Wooster, 11 Paige Ch., 441.)

II. A foreign administrator bringing assets into this State could be held accountable here in equity, if not as executor *de son tort*.

In Campbell *vs.* Tousey, (7 Cow., 64,) the foreign administrator was held responsible as executor *de son tort*. The authority of that case is questioned, but in States using the common law practice of administering estates it would seem to be correct. But equity would have jurisdiction, where a proper case was presented. (McNamara *vs.* Dwyer, 7 Paige Ch., 239, cited and approved in Lyman *vs.* Parsons, 20 N. Y., 103; Ordronaux *vs.* Helie, 3 Sandf., Ch. 512; Suarez *vs.*

---

Cabanne, et al. v. Skinker, Ex'r Forsyth, et al.

---

Mayor, etc., 2 Sandf., Ch. 173; Pugh's Ex'r vs. Jones, 6 Leigh, 299; Tunstall vs. Pollard, 11 Leigh, 1; Pipkin vs. Casey, 13 Mo., 349.)

III. The executor, deriving his authority from the will of his testator, has greater power than an administrator deriving his authority solely from the law of the State appointing him. The will is universally recognized, the statute is of no force outside of the State enacting it. (Rand vs. Hubbard, 4 Metc. Mass., 255; Taylor vs. Benham, 5 How., [U. S.] 233; 2 Kent's C., 430, n. a, and 431, n. c.)

*Samuel Reber*, for Defendants in Error.

I. Tesson, the executor, is not accountable as such for the proceeds of the Colorado Mine. (Peck vs. Mead, 2 Wend., 470; Morrill vs. Morrill, 1 Allen, 132; Aston's Est., 5 Whart., 228; Jacobs vs. Bull, 1 Watts, 370; Sto. Confl. Law, § 523; Hooker v. Olmstead, 6 Pick, 481.)

II. If we are to consider the suit as an attempt to hold the executor (and his sureties) liable as a trustee, on the ground that he has speculated on the trust fund, the petition is wholly insufficient, because it is not drawn with that view, or on that theory.

SHERWOOD, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in chancery to set aside, as fraudulently made, the annual settlements and the final settlement of the estate of John P. Cabanne, deceased—Edward P. Tesson being executor of the last will of the decedent—for taking an account of the sums of money received by Tesson during the course of his administration, and for judgment in favor of plaintiffs, who claim as residuary devisees and legatees of Cabanne, against said executor and the sureties on his bond. The petition is as follows:

Petitioners state, that John P. Cabanne, the brother of the petitioners, died on or about April 18, 1863, having made and published his last will, bearing date September fifteenth, eighteen hundred and sixty, which said will was duly proven

before the St. Louis Probate Court on April 24th, 1863; that by said will said John P. directed that all his debts should be paid out of the real and personal estate devised and bequeathed to the plaintiffs, and he therein devised to his mother, Virginia C. Cabanne, two lots in Carr's addition, and directed his executor, Edward P. Tesson, to erect and build on said lots a dwelling house, to cost not less than \$5,000, nor more than \$10,000.

And subject to said bequest and devise, said John P. Cabanne bequeathed and devised the rest, residue and remainder of his estate, real, personal and mixed, to his brothers, the plaintiffs, Joseph C. Cabanne and Sarpy C. Cabanne, in equal shares as tenants in common.

The petition further states, that on May 1, 1863, said Edward P. Tesson duly qualified as executor, and gave bond to the State of Missouri in the penal sum of forty thousand dollars with the said defendants, Robert Forsyth and Pierre A. Berthold, as sureties, as required by law. Said bond was subject to a condition, that if the said Edward P. Tesson, executor of the last will and testament of said John P. Cabanne, should well and faithfully execute the said last will and testament, and should make true and faithful inventories, returns and settlements of account of the estate of the testator according to law, and should moreover do and perform all other matters and things touching the execution of said last will and testament as are or shall be prescribed by law or enjoined on him by the order, sentence or decree of any court having competent jurisdiction, then said obligation to be void, otherwise to remain in full force.

And thereupon letters testamentary, dated May 1, 1863, were by said St. Louis Probate Court duly issued to said Edward P. Tesson, as executor of the last will of said John P. Cabanne, and it thereby became and was the duty of the said Edward P., as executor, to look after and protect the property of the said John P. Cabanne, wherever situate, for the benefit of the creditors of the said John P. and his legatees and devisees, and especially for the benefit of the plaintiffs as residuary legatees and devisees of the said John P. Cabanne.



---

Cabanne, et al. v. Skinker, Ex'r Forsyth, et al.

---

Sometime in the year eighteen hundred and sixty, the said John P. Cabanne purchased a valuable gold mine in Gilpin county, Colorado Territory, for which he paid the sum of ten thousand dollars. Said mine was known as the Bobtail Lode Gold Mine.

On or about April 1, 1861, said John P. Cabanne formed a co-partnership with Lamar E. Suber, who had been a clerk for Edward P. Tesson, and with Edward M. Tesson, a son of said Edward P., for the purpose of working said Bobtail Lode Gold mine, and other mines. The articles of said co-partnership were reduced to writing.

By the terms of said articles, it was agreed that said John P., Lamar E., and Edward M. should be jointly interested in the profits and losses of working said Bobtail Lode Gold Mine, each taking one-third of the profits, and paying one-third of the losses, but that said Suber and Edward M. did not purchase any part of the title, interest or estate of the said John P. in the realty of said mine, and by the terms of said articles, the title and ownership of said mine remained in said John P. Cabanne, and any title and interest remaining in said John P. at the time of his death vested in the plaintiffs as devisees, subject to debts due by him.

The petition states, that Edward P. Tesson was doing a banking business in the city of St. Louis from the year 1860 to the year 1864, under the name and style of Tesson and Danjen, and from the year 1864 to the date of his bankruptcy, in 1868, did business under the name and style of Tesson, Son, & Co., part of the time the firm being composed of the said Edward P. Tesson, Lamar E. Suber and Edward M. Tesson, the said Suber dying about A. D. 1865, and said Edward M. continuing until January 3, 1868, when said firm was adjudged bankrupt; that said Cabanne, Suber and Edward M. Tesson worked said Bobtail Lode Gold Mine, and other mines and mills for about two years, but made no profits to be divided, and became indebted to said Edward P. Tesson, doing business as Tesson & Danjen, in a large amount, but to what amount your petitioners cannot accurately state, but with ten

---

Cabanne, et al. v. Skinker, Ex'r Eorsyth, et al.

---

per cent. interest, the rate charged by said Tesson & Danjen, the balance due on May 9, 1864, as appears by the books of Tesson and Danjen, was about the sum of \$19,207.40; that the partnership of said Cabanne, Suber & Tesson was dissolved by the death of John P. Cabanne on or about April 18th, 1863; in the year eighteen hundred and sixty-two the said firm of Cabanne, Suber & Tesson became indebted to Benjamin F. Lathrop, of Colorado, who commenced suit against said firm, and process being served only on John P. Cabanne, the suit was dismissed as to said Suber and Tesson, and judgment was rendered on July 31, 1862, by the district court of said Territory in favor of said Lathrop against said John P. Cabanne for the sum of \$490.48, which judgment was a lien upon the real estate of John P. Cabanne; that by virtue of an execution issued upon said judgment, the sheriff of Gilpin county, in said Territory, did levy upon and seize all the title and estate of said John P. in said Bobtail Lode Gold Mine, and on November 6, 1862, said sheriff did sell the said mine to said Lathrop, the plaintiff in the execution, for the debt and costs, and thereupon said sheriff did give to said Lathrop, as provided by the statutes of said Territory, a certificate of his purchase, and that said Lathrop would be entitled to a deed if said land was not redeemed by said John P., his heirs, executors, administrators or assigns within twelve months, or by a judgment creditor within fifteen months; that it was provided by the statutes of said Colorado Territory, then in force, that when the real estate of a judgment debtor should be sold under an execution issued upon a judgment, said judgment debtor, his heirs, executors, administrators and assigns might redeem said lands by paying the amount of the bid or purchase money, with ten per cent. interest, to the purchaser, at any time within twelve months, and it was also provided that said sheriff's certificate should be assignable, and that the assignee of the purchaser should be entitled to receive the sheriff's deed; that said Edward P. Tesson, after the death of said John P. Cabanne, and after he had taken out letters testamentary on the estate of said John P., to-wit, in the month of August, A. D. 1863,

---

Cabanne, et al. v. Skinker, Ex'r Forsyth, et al.

---

employed an attorney to go out to Colorado to examine into the affairs of said Cabanne, Suber & Tesson, and of said John P., and said attorney, out of moneys collected by him belonging to said John P., or said Cabanne, Suber & Tesson, paid to said Lathrop the sum of \$587.25, and said Lathrop thereupon assigned to said Edward P. Tesson said certificate of purchase of said mine, whereby said Tesson became entitled to demand and receive the sheriff's deed for said Bobtail Lode Gold mine, so sold as aforesaid, as the assignee of said Lathrop; that in March, A. D. 1864, the said Edward P. Tesson, being still executor as aforesaid, employed an attorney and agent to go to New York with Edward M. Tesson, to try to effect a sale of said Bobtail Lode Gold mine, and said attorney and Edward M. did effect a sale of the mine so acquired by said Edward P. Tesson as aforesaid from said Lathrop to the Bobtail Lode Gold Mining Company for the sum of fifty thousand dollars, and said Edward P. Tesson received for said mine, after deducting exchange, the sum of forty-nine thousand nine hundred and thirty-seven 50-100 dollars, on May 27, A. D. 1864, and brought said fund into the State of Missouri, and credited the same upon his books to the account of said firm of Cabanne, Suber & Tesson, when the same should have been credited to the account of John P. Cabanne's estate, of which said Tesson was then executor, and continued so to be until June, A. D. 1866; that said John P. Cabanne, on September 4, 1862, executed to Wm. P. Miller, trustee of Virginia C. Cabanne, a mortgage or deed of trust to secure the payment of a note dated June 17, 1861, for \$10,000, payable three years after date, and three interest notes of \$500, each payable in six, twenty and thirty-six months after date, and after said agreement made by said Tesson to sell said mine, said Virginia C. Cabanne, to enable said Tesson to complete said sale, executed to him, as executor of John P. Cabanne, a release of said mortgage, dated April 24, 1864; that it was the duty of said Edward P. Tesson, as executor of the last will of the said John P. Cabanne, to have redeemed said land from said judgment and execution sale for the benefit of the plaintiffs as residuary

---

Cabanne, et al. v. Skinker, Ex'r Forsyth, et al.

---

legatees and devisees, and the said Edward P., in purchasing said certificate and in taking said assignment of said certificate from said Lathrop, was in law trustee for the benefit of the plaintiffs, and in making said sale of said mine and in receiving said sum of \$49,937.50, said Edward P. was chargeable as their trustee, and was and is liable to account to them for said sum of money thus received, and should have accounted for the same in the accounts filed by him in the St. Louis Probate Court as assets of said estate of John P. Cabanne; that although said Edward P. Tesson received said sum of \$49,937.50 as the proceeds of the property of John P. Cabanne, yet the said Edward P. fraudulently and in violation of his duty as executor, and disregarding the rights of the plaintiffs as residuary devisees and legatees of John P. Cabanne, converted said sum of \$49,937.50 to his own use, and although the said Edward P. made a settlement of his doings, as executor at the June Term, A. D. 1864, of the St. Louis Probate Court, yet the said Edward P. neglected to report said sale and the receipt of said money to said Probate Court, and failed to charge himself in his account with said sum of \$49,937.50, as it was his duty to have done; that although it appeared upon the books of Tesson & Danjen that said firm of Cabanne, Suber and Tesson was indebted to said Edward P. Tesson, and that said John P. Cabanne was also indebted to said Edward P. Tesson on his private account, yet the said Edward P., being executor, failed to present his accounts for allowance against the estate of said John P. Cabanne at said June Term, A. D. 1864, of said Probate Court or at any other term of said Court, and never had said accounts or the debts appearing to be due thereby allowed at any time, so that plaintiffs, who were infants, and their guardian, Lucien D. Cabanne, never had the opportunity to investigate the same; that at the date of his death, the said John P. Cabanne left a large real estate in the counties of St. Louis and Jefferson in this State, exceeding in value \$50,000, all which was liable to the payment of the debts of the said John P.; that, after the receipt of the said sum of \$49,937.50, the said Edward P. paid to

---

Cabanne, et al. v. Skinker, Ex'r Forsyth, et al.

---

said Virginia C. Cabanne the said mortgage debt of ten thousand dollars and three interest notes amounting to \$1,500; that, at his annual settlement at the June Term, 1864, of said Probate Court, said executor charged himself with \$148 of personal property, and credited himself with the sum of \$1,059.62, which included two of said interest notes of \$500 each, and showing a balance in his favor of \$911.62; that, at his annual settlement at the June Term, A. D. 1865, of said Probate Court, he credited himself with said balance of \$911.62 and with the third of said interest notes of \$500, and showing a balance in his favor of \$1,455.44; that, at the June Term, 1866, of said Probate Court, the said executor made a final settlement and credited himself with said balance of \$1,455.44, and showed that he had paid all the debts allowed against the estate of said John P. Cabanne, excepting one allowed December 28, 1863, in favor of T. H. Richardson, for the sum of \$1,175.29, and showing a balance in his favor of \$2,109.59, and on the 18th June, 1866, said Edward P. Tesson was by said Probate Court finally discharged. A copy of the report of said settlements is herewith filed.

The petition alleges, that on April 19, 1867, said Edward P. Tesson presented to Lucien D. Cabanne, guardian of the plaintiffs, an account charging the estate of John P. Cabanne with the sum of \$2,222.59 as the balance found in his favor at his final settlement, and also with \$5 retained for expenses of final settlement, whereas said sum of \$2,109.59 was the true sum allowed, and included said sum of \$5; and said Edward P. also charged said claim in favor of T. H. Richardson, allowed December 28, 1863, and also charged \$289.85 as interest on the same, the whole of said account amounting to \$4,397.78, which was paid out of the moneys of the plaintiffs by their said guardian, the said Edward P. having had the moneys of the plaintiffs in his hands since May 19, 1864, employing the same in his banking business at the rate of ten per cent. per annum, and charging that rate against the plaintiffs in his account paid by said L. D. Cabanne as guardian of the plaintiffs; that said plaintiffs,

at the date of said final settlement on June 15, 1866, were infants, under the age of twenty-one years; that the plaintiff, Joseph Charless Cabanne, became of age October 16, 1867, and that Sarpy Carr Cabanne became of age on December 13, 1868; that said Edward P., executor as aforesaid, by thus converting said sum of \$49,937.50 to his own uses, and in applying the same to the payment of the debts claimed to be due to him by said John P., without authority of the Probate Court of St. Louis County, was guilty of a fraud upon the rights of the plaintiffs as residuary devisees and legatees of said John P. Cabanne, and that said executor had no right in law or equity to apply said sum even in part to the payment of any debt due him by said John P. Cabanne, or said firm of Cabanne, Suber & Tesson, until his claim against said estate had been properly passed upon and allowed by said St. Louis Probate Court; that until after said Tesson became bankrupt on January 6, 1868, and until within a year last past, they were ignorant of said fraud and of the manner of its perpetration, except that about two years ago, and after said bankruptcy, they learned that Edward P. retained money belonging to them, and it was only in the prosecution of a suit against the estate of said Edward P. Tesson in bankruptcy, and from an examination of the books of said Tesson since he was adjudged a bankrupt, that they learned how said fraud was perpetrated.

Although the said Edward P. Tesson, executor of the said John P. Cabanne, having failed to present his demands against the estate of John P. Cabanne for allowance to the St. Louis Probate Court, was barred by the Statute in such cases made and provided, from retaining his demand out of any money received by him as executor, yet the plaintiffs being willing to do equity, are ready to allow all just claims in favor of said Edward P. Tesson, or of Tesson & Danjen, or the subsequent firm of Tesson, Son & Co. against said John P. Cabanne, or said firm of Cabanne, Suber & Tesson, and they are willing an account should be taken and stated upon the terms of allowing the demands of said Tesson, and Tesson & Danjen, allowing payments made after final settlement in the Pro-



---

Cabanne, et al. v. Skinker, Ex'r Forsyth, et al.

---

bate Court, charging all sums received and correcting all errors in the accounts as they appear upon the books of said Tesson & Danjen, and of Tesson, Son & Co.

They state, further, that in a proceeding in the United States District Court, by these plaintiffs against Robert K. Woods, assignee in bankruptcy of said Tesson, Son & Co., and of said Edward P. Tesson, an account was taken and stated, of the amount due by said Tesson, as executor, to these plaintiffs, and a balance was found due the plaintiffs, with interest to the date of the bankruptcy on Jan 6, 1868, of the sum of \$18,030.75. Any dividend they may receive upon said allowance, they will credit upon the demand made in this suit against the defendants.

In consideration of the premises, plaintiffs pray, that said final settlement of his administration of the estate of said John P. Cabanne, made by said Edward P., as executor as aforesaid, and the said annual settlements may be set aside as fraudulently made; that an account may be stated of said sum of forty-nine thousand nine hundred and thirty-seven dollars and fifty cents received by said executor on May 29, 1864, from the sale of the said Bobtail Lode Gold Mine belonging to said John P. Cabanne, and in his will devised to the plaintiffs, showing what sum is justly due the plaintiffs, after allowing all debts due by said John P. Cabanne to said Edward P. or to said Tesson & Danjen, or to said Tesson, Son & Co.; and that, for the balance thus found due, plaintiffs may have judgment against the defendants for the penalty of said bond, to be satisfied by the payment of the balance thus found due; And that they may have such other and further relief as to the court may seem meet, etc.

The defendants demurred to this petition, assigning as grounds for their demurrer:

First—That the said amended petition does not state facts sufficient to constitute a cause of action against this defendant.

Second—That said amended petition shows, that the proceeds of the sale of said Bobtail Lode Gold mine, and the said

mine itself, were not assets in the hands of said Tesson as executor of said Cabanne, and that as such executor he had no control of said mine, or of the proceeds of the sale thereof, and that the proceeds which he received on the sale of said mine were not accounted for by him as executor under the letters granted to him by the St. Louis Probate Court.

Third—That the acts and doings of said defendant, Tesson, if true, would make him accountable as trustee in a court of equity for the profits he made in the purchase of said certificate from the said Lathrop, but do not make him accountable as executor, for the reason, among others, that the said gold mine was real estate, not subject to be administered according to or under the laws of this State.

Fourth—The amended petition does not show any sufficient reason why the accounts of said Tesson should be overhauled, or his settlements in the Probate Court set aside.

The petition was adjudged insufficient, and plaintiffs declining to amend, judgment on account of such insufficiency went against them. The propriety of this ruling will now be considered.

So far as concerns the realty, a will beyond the jurisdiction where it is probated is inoperative, and has no extra-territorial force or validity; and the executor of such will cannot, because of his appointment in accordance with the laws of *one* State, thereby acquire authority to sue for, or in any manner intermeddle with, the property or effects of his testator, whether real or personal, in *another* State, unless the will be there proven, or the laws of such State dispensing with the probate anew confer the requisite permission. (*Kerr vs. Moon*, 9 Wheat., 565; *Doe vs. McFarland*, 9 Cranch., 151; *Sto. Conf. L.*, § 474; *McCormack vs. Sullivant*, 10 Wheat., 192; *Lucas vs. Tucker*, 17 Ind., 41; *Wills vs. Cowper* 1 & 2 Ohio, 312.)

Under the circumstances then, as detailed in the petition, Cabanne, the testator, must be regarded as having died intestate as to whatever lands in the Territory of Colorado he was possessed of at the time of his decease; and those lands of course,

in consequence of his intestacy, descended in conformity to the laws of that Territory to his heirs at law. But as to who those heirs are, no information is afforded us. There is not the remotest information contained in the petition, that the plaintiffs are those heirs, nor is it shown that the plaintiffs had any title, either legal or equitable, in the property in Colorado. If they had no interest in the land itself, they certainly could have none in the proceeds arising from the sale thereof.

It being out of the power of the executor, as such, to have any control over, or right to interfere with, the property situate in Colorado, it must inevitably follow, that neither he nor his sureties can, in consequence of any acts done in Colorado, be held liable on the bond given for the faithful performance of the duties pertaining to the executorship in this State.

Whether Edward P. Tesson could, under proper averments made by the proper parties, be held chargeable as *trustee* for the misapplication of the funds received, it is wholly unnecessary to discuss, as no such case is here presented; the petition being drawn on a widely different theory, and looking to a recovery on the *bond alone*.

Again, it is not shown whether the money collected, with which the purchase of the certificate of sale of the Bobtail Lode Gold Mine was effected, belonged to the estate of the testator, or to the firm of Cabanne, Suber & Tesson, and if to the latter, the credit for the amount realized from the sale in New York of the mine was rightly given and entered on the books of Tesson & Danjen, in favor of the firm whose funds purchased the certificate from Lathrop.

Any responsibility, therefore, which would attach to Edward P. Tesson in consequence of his misappropriation of the funds of the firm above referred to, would have existence only as between him and the representatives of said firm.

The petition exhibits other objectionable features, which, although not unobserved, will, as they are not pointed out in the demurrer, pass unnoticed.

---

Claffin, et al. v. Torlina, et al.

---

It will thus be easily seen, that there are four grounds upon which the ruling of the court below may be readily and satisfactorily upheld, and why no recovery can be had on the bond:

1st. No right nor capacity is shown on the part of the plaintiffs to sue.

2nd. The money was not collected by the executor as executor.

3rd. To whom the money belonged, with which the purchase of the certificate of sale was obtained, does not appear.

4th. And from aught to the contrary appearing, the money realized in New York was properly credited to the firm of Cabanne, Suber, & Tesson.

In consequence of the foregoing, the petition stated no cause of action, and the judgment will be affirmed. All the judges concur.

—o—

HORACE B. CLAFLIN, *et al.*, Appellants, *vs.* JOHN D. TORLINA, *et al.*, Respondents.

1. *Nat. bankr. law—Composition, what invalid.—Semble*, that an agreement, by which one creditor obtains seventy-five per cent. of his own claim, and agrees only to secure to other creditors 30 per cent. would be a violation of the national bankrupt law and would not be enforced here, any more than in the courts having special jurisdiction in bankrupt cases.

*Appeal from St. Louis Circuit Court.*

*Krum & Patrick*, for Appellants.

*Henry N. Hart*, for Respondents.

NAPTON, Judge, delivered the opinion of the court.

This was a suit upon a note of Hafkemeyer, indorsed by Torlina, Endres & Co. The first answer set up the defense so far as Torlina, Endres & Co., were concerned, (the suit having been dismissed as to Hafkemeyer,) that the indorse-

ment of said note was made upon a consideration that had totally failed; that the plaintiffs had instituted proceedings in the district court of the United States against Hafkemeyer, to have him declared a bankrupt, and that this note was indorsed by the defendants, Torlina, Endres & Co., upon condition that said suit would be dismissed by the plaintiffs, and that they would procure the creditors of Hafkemeyer in New York, Pennsylvania, New Jersey and Massachusetts to compound their claims against Hafkemeyer at 30 cents on the dollar; that this was the sole consideration of their indorsement—and that the consideration failed—that the plaintiffs did not dismiss their suit, and did not procure the composition which they promised.

This answer was stricken out on motion of the plaintiffs. There were other answers filed, which met the same fate. Finally the answer was, that the notes sued on by plaintiffs were made by Hafkemeyer, and indorsed by Torlina, Endres & Co., in violation of the bankrupt act—that there was a proceeding pending against Hafkemeyer, instituted by plaintiffs, to have him declared a bankrupt, and that, during the pendency of said proceeding in the United States District Court, these notes were given and indorsed upon the condition and consideration, that plaintiffs would not oppose Hafkemeyer's discharge, and would get the creditors elsewhere to agree to a composition at 30 per cent.

To this plea there was a replication, and the parties went to trial on that issue; but the court refused to hear any evidence, on the ground that the plea was no defense, and of course the plaintiffs got a verdict. In the motion for a new trial an affidavit was filed, stating more specifically the facts relied on as a defense than was stated in either plea.

These facts are that on the 25th of February, 1870, there was filed by plaintiffs a petition in the United States District Court, against Hafkemeyer, alleging the commission of various acts of bankruptcy on his part; that Hafkemeyer denied these allegations; that the plaintiffs threatened to institute criminal proceedings against Hafkemeyer for embezzle-

ment; that the defendants were large creditors of Hafkemeyer, and the plaintiffs proposed to them, if they would indorse the notes sued on (which covered about 75 per cent. of their claim) they would drop the prosecution and make no further opposition to Hafkemeyer's discharge, and that they would, without delay, procure a composition with all of Hafkemeyer's creditors at 30 cents on the dollar; that thereupon the plaintiffs executed a full discharge of Hafkemeyer, and that afterwards they failed to effect any compromise and never dismissed the proceedings in bankruptcy, but that Hafkemeyer was subsequently declared a bankrupt, and one Green appointed as his assignee, and he was ordered to sell all the goods of Hafkemeyer at auction—and that he did sell them at a great sacrifice.

The answers in this case seem defective, and the ground of defense seems not to have been fully determined by the pleader. The facts stated in the affidavit clearly constituted a defense—for if the contract was in violation of the bankrupt law, the notes were void—and if it was not, as is now insisted by plaintiffs, then it was not performed and the notes then were without consideration.

We should incline to think that an arrangement of this kind, by which plaintiffs secure 75 per cent. of their claim, agreeing only to secure to other creditors 30 per cent., would be a violation of the bankrupt act, and would not be enforced here, any more than it would be in the courts having special jurisdiction in bankrupt cases.

However this may be, we concur in the judgment of the General Term, who ordered a new trial. The merits of the case do not appear. The judgment of the General Term is therefore affirmed. The other judges concur.



---

Harvey, et al. v. Heirs of Sullens, et al.

---

DAVID D. HARVEY, *et al.*, Respondents, *vs.* THE HEIRS OF  
ISAAC SULLENS, *et al.*, Appellants.

1. *Wills—Contest, touching—Right to open and close.*—In a statutory proceeding to contest a will (Wagn. Stat. 1368, § 29) the *onus probandi* is upon the defendant, and he is therefore entitled to open and close. But the right to open and close generally rests very much in the sound discretion of the court; and an error upon this point will not warrant a reversal, unless defendant is shown to have suffered injury in consequence.
2. *Wills—Capacity necessary to render testator competent.*—To render a testator competent to make his will, the law does not require any particular degree of understanding. He is simply required to be of sound mind to manage his own affairs, and to know intelligently what disposition he is making of them.

*Appeal from St. Louis Circuit Court.*

Geo. P. Strong, for Appellants.

I. Defendants were entitled to open and close. (Cravens *vs.* Faulconer, 28 Mo., 19; Tingley *vs.* Cowgill, 48 Mo. 291; Handley *vs.* Stacey, 1 Fost. & Fin., 674.)

II. Physical inability to transact business constitutes no disqualification for making a will. There must be a want of mental capacity, not to "transact," but to comprehend or understand, ordinary business. (1 W'ms Ex., 36; Stanell *vs.* Kenan, 33 Ga., 56; Stewart's Ex. *vs.* Lispenard, 26 Wend., 255.)

T. G. C. Davis, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs filed their petition in the Circuit Court, for the purpose of contesting the will of Elizabeth Sip, deceased, which had previously been admitted to probate. By the will all the testatrix's real estate, which comprised the greater portion of her property, was devised to the defendant, Sullens, who was to her an entire stranger in blood.

The petition alleged that the paper writing produced was not the last will and testament of Mrs. Sip; that it was obtained by undue influence, and that when she made the same she was not of sound and disposing mind.

These allegations were all denied in the answer, and it was averred that the writing was the will of Mrs. Sip. There was a verdict for the plaintiffs. At the trial the defendants requested, that they should be allowed to open and close the case to the jury; but this request was denied by the court, and the plaintiffs were granted the privilege of opening and closing; and this ruling is alleged to be erroneous. Upon the question as to who should have the opening and closing of the case to the jury, there has been a conflict in the adjudications in this State as well as in others. The real issue in cases of this description is, whether the writing produced is the will of the testator or testatrix, or not, and the *onus* or burden of proof is cast upon the defendants who seek to establish the will. And I think, therefore, the better doctrine is, that they are entitled to open and close. It was so held in *Cravens vs. Faulconer*, (28 Mo., 19) where it was declared, that, as the burden of proof rested upon the defendants, they should be allowed to open and close the case to the jury. The correctness of this decision was doubted in *Farrel's Adm. vs. Brennan's Adm.* (32 Mo., 328), and it was there intimated that the plaintiffs, or the party attacking the will, should be allowed to open and close; but it was said that an error in respect to that matter would furnish no ground for a new trial, unless the party had been materially injured in consequence of it. The point was again presented to this court in *Tingley vs. Cowgill*, (48 Mo., 219) where we approved of the doctrine laid down in *Cravens vs. Faulconer*, and held that when the issue is made up, the defendants, endeavoring to establish, or hold under, the will, affirm that the paper writing is the last will and testament of the testator or testatrix; that they have the affirmation of the issue to be tried, and they are then entitled to open and conclude. The right to open and close generally rests very much in the sound discretion of the court trying the cause, and an error committed in that regard will not be sufficient to reverse a case, unless it is plainly made to appear that injury has resulted therefrom. Although we are clearly of the opinion that the court

ruled incorrectly, and that the opening and conclusion should have been awarded to the defendants, still we will not reverse for that reason, when it is not shown that they were injured thereby.

It is complained, that the court erred in submitting issues to the jury. The following issues were framed and submitted: 1st. Whether the defendant, Sullens, procured and induced Elizabeth Sip, by fraud, to put her mark to the paper writing, propounded by him as her will; 2nd. whether she was, when she put her mark to the paper writing, of feeble and unsound mind, and incapable of making a will, by reason of her infirmities and feebleness of mind; 3rd. whether Sullens procured or induced her to put her mark to the said paper writing, by undue influence exercised by him on her mind and will; and 4th. whether the paper writing was her will.

The statute (2 Wagn. Stat. 1368, § 29) says, that upon a contest of a will in the Circuit Court, an issue shall be made up whether the writing produced was the will of the testator or not. This statutory issue was made up and presented, and others besides, but they merely stated the elements and ingredients that were contained in it, in different forms, and they furnish no just ground of complaint.

This case was previously in this court (46 Mo., 147) and a summary of the facts are there given. As disclosed by the evidence, they are essentially the same now as they were then. The instructions given for the plaintiffs are the same as they were in the case when it was here before, with the exception of the first in the series—which was given upon the second trial for the first time. That instruction told the jury, that if they believe from the evidence, that a confidential relation existed between Isaac Sullens and Elizabeth Sip for years before the paper propounded as her will was signed with her mark, and that by reason of said confidential relation the said Sullens had acquired influence over the mind of the said Elizabeth, and that the said confidence continued up to the time she made her mark to the said paper, and that the

---

Harvey, et al. v. Heirs of Sullens, et al.

---

said paper was written by the said Sullens, and gives to him all the real estate of which she was the owner at the time of her death, the law presumes that the said paper was obtained by the said Sullens from the said Sip by undue influence, and this presumption of law cannot be removed except by clear and satisfactory evidence, that the purpose to give the said real estate to the said Sullens, arose, sprung and originated in the free and uninfluenced mind of the said Sip; and the burden of proof in this respect, is upon the defendants. The instruction is not objected to because it announces any incorrect principle of law, but it is contended that there was no evidence justifying it. We think otherwise. There was evidence showing that Sullens had formerly transacted business for Mrs. Sip, and that the most intimate and confidential relations existed between them, continuing down to the day of her death. The evidence was sufficient to take the case to the jury, and they might well infer therefrom that such a state of facts existed.

But the main point, which is alleged for error, is the action of the court in giving plaintiffs' fourth instruction. That instructed the jury as follows: "If you believe from the evidence in this cause, that Elizabeth Sip, deceased, was, at the time of putting her mark to the paper writing propounded by the defendants, old and infirm in body, and feeble and childish in mind, and so incapable of transacting her ordinary business, then she had not sufficient capacity to make a will."

It is insisted that this instruction established an erroneous standard of capacity to make a will. When the case was here on a former occasion, the same instruction was in it, and we then declared as a proposition of law it was not correct, but that, under all the circumstances surrounding the case, it was well enough. If a person is of unsound mind, and incapable of managing his affairs, then he surely does not possess capacity sufficient to make a will, and this was probably the idea in the mind of the draftsman of the instruction. If so, he was unhappy in expressing it.

Many cases have been cited to show, that a person of the very weakest understanding is capable of making a will. The leading case, and the one most relied on, is Stewart's Ex. vs. Lispenard, (26 Wend., 255) where it was held, that idiots, lunatics, and persons *non compos mentis*, were disabled from disposing of their property by will, but that every person not embraced within either of the above classes, of lawful age, and not under coverture, was competent to make a will, let his understanding be ever so weak; and that courts, in passing upon the validity of a will, would not measure the understanding of the testator, if he was not totally deprived of reason. Whether he was wise or unwise, he was the lawful disposer of his property, and his will would stand as a reason for his actions. But in the great will case of Delafield vs. Parish, (25 N. Y., 9) Stewart vs. Lispenard is directly overruled. In speaking of that case, Judge Daviess, who delivered the opinion of the court, says, "The case of Stewart vs. Lispenard has challenged much discussion in this State, and has not been regarded with favor by the bench or the bar. The circumstances, under which it was heard and decided on the part of the court, are such as to carry with it little if any weight or authority. In that case, the will of a person, conceded to be but a slight remove in intellectual power above an idiot, was, by a decree of that court, directed to be admitted to probate. The argument of the case was commenced in that court on the 21st day of December, 1841, and concluded on the 24th. On the 31st of that month, the last day of the official term of one-fourth of the senate, the case came up for decision, and was decided, with little opportunity for an examination of facts, which the report says were contained in a voluminous case of upwards of 300 pages, and without the benefit of any written opinion, except that of Senator Livingston (and which has since been published), or any suggestions even from the judges of the Supreme Court. The only justice of that court being present by courtesy to form a quorum, stating that he had no written opinion to present, not having leisure, since the argument was closed, to digest the facts of

the case, or even to read the numerous authorities which had been cited, amounting to nearly or quite a hundred cases, and he declined to deliver an opinion. Senator Verplank orally stated his reasons for reversal, and thereupon the court, composed exclusively of senators, by a vote of 12 to 6, reversed the decree of the chancellor, which affirmed the judgment of the circuit judge, who affirmed the decree of the surrogate, refusing to admit the will to probate, and the court, by a vote of 11 to 8, made a decree directing the will to be admitted to probate. After the breaking up of the court, the learned opinions of two of the senators, who voted to reverse the decree of the three courts below, were published and appear in our reports; but they must be regarded as containing the views of the distinguished senators, and not those of the court. We fully concur in what is said by Mr. Justice Clarke in *Thompson vs. Thompson*, (21 Barb., 116) that the opinions of those learned and distinguished senators in this case are not binding authority. It is not an inappropriate commentary upon the case, to add that subsequent to the decision of the court of errors in an action of ejectment in the superior court of New York, before Chief Justice Oakley and a jury, the jury under instructions from the court found that this same Alice Lisenard was an idiot, and had no testamentary capacity, thus annulling this same will as to real estate. This verdict was rendered after a protracted investigation, and the examination of a large number of witnesses."

The cases are so numerous on the subject of testamentary capacity, that we will not attempt to review them. A few, however, which it is deemed contain the soundest views, will be noticed. Chancellor Walworth, in *Clark vs. Fisher*, (1 Paige, 171) said, "The general principles, in relation to the capacity of a person to make a will, are well understood. He must be of sound and discerning mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property, and to the relative claims of different persons who are, or might be, the objects of his



---

Harvey, et al. v. Heirs of Sullens, et al.

---

bounty." In *Shropshire vs. Reno*, (5 J. J. Marsh. 91) Robertson, Ch. J., observed, that the facts in that case led the court to the opinion, "that the testator had not a disposing mind, or that, if he ever had, it was not in a disposing state. He was not superannuated, nor was he absolutely *stultus* or *fatuus*; but all the facts combined tend to show that he had not a sound memory, nor sufficient mind, nor a mind in a proper state for disposing of his estate with reason, or according to any fixed judgment or settled purpose of his own. This we consider the true test, established not only by philosophy but by law."

In *Harwood vs. Baker*, (3 Moore Priv. C. R., 282-290) Erskine, J., observes, "But their lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is, by his will, giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property."

In *Den vs. Johnson*, (2 Southard 454) the Chief Justice, in charging the jury on this subject, said, "that a disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning and feeling the relations, connections and obligations of family and blood; that though it has been sometimes said, as had been stated from the books, that if one could correctly tell his name, say the day of the week, or even ask for food, it is a sufficient evidence of a disposing mind; yet such sayings, though they show that wills are not lightly to be set aside on suggestions of incapacity, can and ought to have but little weight with rational men, investigating the truth upon their oaths; that if, upon the whole, they should be of the opinion that the mental powers of the testatrix were so far enfeebled and broken, as that she could not make a discreet disposition of her affairs herself, and the will in question was devised by other persons, and only assented to by her, upon being asked, without the power

of understanding it, then they ought to find for the plaintiff," that is, that it was not her will.

Aside from the instruction which is so strongly objected to, the court gave several others, which presented the questions of undue influence and testamentary capacity with unquestionable correctness. Even the defendants, at their own instance, asked and obtained an instruction, which contains the very language now complained of. It was in the following words: "The court instructs the jury that, even if they find from the evidence that Mr. Sullens wrote the will, and requested those in the room to retire while it was read, and that it was read to her, when no one but Dr. Williams and Mr. Sullens were present with Mrs. Sip, and that Dr. Williams was a relation of Mr. Sullens' wife, and that Mr. Sullens was the principal devisee, yet, if the jury believe from the evidence, that the will was prepared by Mr. Sullens at her request, that she desired the contents of it to be kept a secret, and that she desired and intended, when she signed the will, to dispose of her property as it is there disposed of, and that, in making such disposition of her property, she was carrying out her own will and desires, and was not induced thereto by any fraud, deceit, or undue influence of said Sullens, or of others in his interest, then the jury will find that said paper writing is the last will and testament of Mrs. Elizabeth Sip, and they will find the issues for the defendants, unless they further find from the evidence, that Mrs. Sip, at the time of putting her mark to said paper, was old and infirm of body, and feeble and childish in mind, and incapable of transacting her ordinary business."

The general rule undoubtedly is, that a party cannot complain of his own instructions, and here we find what is considered objectionable embodied in one of his own requests. But the third instruction given for the defendant we think so clearly explains and modifies the ones above referred to, and so intelligently expresses what constitutes testable capacity, that the case is shorn of all difficulty. It declares, "The court instructs the jury that if they believe from the evidence,

that Mrs. Sip, at the time of signing her name or mark to the paper writing propounded as her last will and testament, had sufficient understanding and intelligence to understand her ordinary business, and to understand what disposition she was making of her property, then she had sufficient capacity to make a will, however feeble and infirm in body or health she might have been."

A lunatic cannot make a will, and where a person is regarded as a fit subject of a commission of lunacy, he is *prima facie* incompetent to make a will. In *Sherwood vs. Sander-son*, (19 Ves., 280) Lord Eldon thus states the rule: "It must appear that the object of the commission is of unsound mind, and incapable of managing his affairs." The converse of this proposition is equally true; if a person is of sound mind, and capable of managing his affairs, then he may make a will. The law does not require any particular degree of understanding, but the person must have sufficient capacity to intelligently know what disposition he is making of his property.

The instructions, when taken together, submitted the case fairly enough, and could not have misled the jury. The judgment should be affirmed. All the judges concur.

—O—

JAMES F. COOK, Respondent, *vs.* THE ST. LOUIS & KEOKUK  
RAILROAD COMPANY, Appellant.

1. *Practice, civil—New trials—Newly discovered evidence—Diligence.*—It is a rule of almost universal application that a new trial will not be granted on the ground of newly discovered evidence, where the new facts are to be proved by a witness who has already testified in the cause, and a new trial should not be granted on such ground, if it appears that the failure to discover it is the result of lack of due diligence.
2. *Practice, civil—New trials—Granting of, matter of discretion with the trial-court.*—The granting of new trials, because of newly discovered evidence, rests for the most part with the trial-court; and any doubt as to whether its discretion has been soundly exercised is to be resolved in favor of its ruling.

*Appeal from St. Louis Circuit Court.*

---

Cook v. St. Louis & Keokuk R. R. Co.

---

*E. A. Lewis*, for Appellant.

*E. B. Sherzer*, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Action on contract. The petition alleged that defendant had employed plaintiff as its civil engineer, at a salary of \$300 per month; that plaintiff was in defendant's employ in such capacity from the twentieth day of August, 1869, until the first day of May, 1870, a period of eight months and ten days, and that the compensation plaintiff was entitled to therefor was \$2500, for which judgment was asked.

The answer denied that defendant ever employed plaintiff as civil engineer, or in any other capacity at \$300 per month, or any other sum; denied that it agreed to pay him said sum or any other sum for his services; denied that it employed plaintiff to do any work or labor for it whatsoever, and denied that plaintiff did any work of labor for it, or was in its employ at all.

A jury was impaneled, and the parties went to trial. The evidence was conflicting, would have well warranted a verdict for either party. The instructions given presented the matters at issue with the most unexceptionable fairness to the jury, and the result was a verdict for the plaintiff. There exists, as appears from the above statement, no tenable ground for attacking the ruling of the court below in point of instructions given in behalf of plaintiff, nor of the refusal to give the third instruction asked by the defendant, even if that instruction were abstractly correct, and otherwise free from just objection.

But the chief, and it might with no impropriety be said, the only question of practical importance in this case, and the one upon which counsel for appellant has laid the greatest stress, is, whether the ruling was correct which denied defendant's motion for a new trial, the main basis of such application being newly discovered evidence.

In reference to applications based on the above mentioned ground, coming as they must from those who have been made

to bite the dust in the forum, and are writhing under the tortures of a recent and unaccepted defeat, it is to be observed that they are regarded with a jealous eye, and construed with remarkable strictness by the courts, who invariably hold, that they should be tolerated, not encouraged, viewed with aversion rather than favor, granted as an exception, and refused as a rule. (3 Grah. & Wat. N. T., 1021, and cases cited; Richardson vs. Farmer, 36 Mo., 35, and cases cited; State vs. Ray, 53 Mo., 345, and cases cited.)

The alleged newly discovered evidence consisted of an account for \$55.25, made out and delivered in November, 1869, to Fogg, then president of defendant, by plaintiff, for making a report on the two surveys from Bowling Green, in Pike county, to New London, in Ralls county, as well as for making the profile of those routes, and supplying the mapping paper for that purpose.

This account, which is certainly inconsistent with the idea of a general or salaried employment, and is in reality an indirect admission that plaintiff's contract with the company was of a special and limited character, remained in Fogg's hands until his resignation in September, 1870, when he delivered to Murray all the official papers in his hands. In the absence of anything in the affidavits to the contrary, as no indentments run in their favor, it will be presumed that Murray was an officer or agent also of the company. At any rate, the above referred to account was found accidentally, as it is claimed, on the 22nd day of February, 1872, just six days after the trial took place, in the possession of the company among its other business papers, where, from aught otherwise appearing, it had been ever since its delivery to Fogg. The suit was brought February 13, 1871; issue joined April, 5th, next following, and the trial occurred nearly a full year after process served.

Fogg was placed on the stand and testified in the cause, but his attention was not called to the account, and yet it is by him that defendant proposes to prove that such account was delivered to him by plaintiff; and without Fogg's testi-

mony, this fact cannot be established. It is a rule, whose infringement is a rarity, not to allow a new trial where the new facts are to be proven by a witness who has already testified in the cause. And the reason given therefor, by learned writers on this topic of the law, is, that with rare exceptions it is unpardonable negligence to fail to elicit from a witness every material fact within his knowledge respecting the subject matter in controversy. (3 Grah. & Wat. on N. T., 1095.)

In *Houston vs. Smith*, 2 Sm. & Mar., 597, the defendant moved for a new trial on the ground that one of the plaintiff's witnesses did not disclose upon the trial all his information of the merits of the case, and although this non-disclosure arose from inadvertence, and because the attention of the witness was not properly directed, yet it was held, that as the defendant had full opportunity for cross-examination, he was not entitled to have his application granted.

The fact that Fogg's attention was not called, when testifying, to the account subsequently discovered, does not better the matter, but only shows a lack of diligence on the part of defendant in failing to propound to his witness proper interrogatories. (*Richardson vs. Farmer*, 36 Mo., 35; 3 Grah. & Wat., on N. T., 1029; 1 *Id.*, 481, *et seq.*)

It is very evident, that, if but a little of the diligence exercised after had been used before the trial, the necessary information as to the accounts would have been readily elicited from Fogg, which would inevitably have led to its intended, instead of its accidental, discovery; or failing in that, the same purpose would have been attained by the introduction of secondary evidence as to its contents.

It does not appear from the affidavits filed herein, that a single question was ever asked Fogg, or that any conversation whatever was had with him respecting his knowledge of the relations which had existed between plaintiff and defendant. And this strange neglect and inexcusable apathy continued, notwithstanding defendant ought to have been on the alert in consequence of plaintiff's verbal notice for the production of



all vouchers presented by him against the company. (People vs. Superior Court of New York, 5 Wend., 114; and cases cited.)

Measured then by one of the vital tests in applications of this character, that of diligence, in making suitable preparations for trial, the application was properly overruled. But even had the requisite diligence been used, still the application could not be successful. The new evidence was cumulative, *i. e.*, evidence of the same import as that adduced at the trial, for Perkins' testimony shows that plaintiff in May, next preceding the presentation of the account for \$55.25 to the president of defendant, made an inferential admission that he was employed by the job, and not on a salary, by claiming that defendant owed him \$162.50 for the survey in Pike county. Both accounts related to the same survey, and were equally and utterly inconsistent with the theory, that plaintiff was to receive a salaried compensation for his labor. The fact that the one account was written, and the other not, by no means altered the principle, or rendered the proposed evidence any the less cumulative. (State vs. Stumbo, 26 Mo., 306; Beauchamp vs. Sconce, 12 Mo., 38; Wells vs. Sanger, 21 Mo., 354; Boggs vs. Lynch, 22 Mo., 563.)

The granting of new trials, because of evidence subsequently discovered, rests for the most part with the trial-court; and any doubt, as to whether the discretion vested in this regard in that tribunal has been soundly exercised, is to be resolved in favor of its ruling. It is only in a case entirely free from any element of uncertainty as to the impropriety of such ruling, that appellate courts feel themselves called upon to interfere (People vs. Superior Court of New York, *supra.*); and it is believed that the reports of our own State do not exhibit a single instance, in which this court has overruled the action of the court below for failure to grant an application of the character under consideration.

Judgment affirmed. All the judges concur.

---

Bailey v. Rosenthal.

---

GEORGE W. BAILEY Respondent, *vs.* BENJAMIN S. ROSENTHAL,  
Appellant.

1. *Justices' courts—Appeal—Sureties—Non-suit.*—Where defendant appealed from the judgment of a justice, and in the Circuit Court plaintiff took a voluntary non-suit, which was afterwards set aside without the knowledge or consent of the sureties on the appeal bond, and plaintiff had judgment against defendant and his sureties. *Held*, that the sureties were bound by the judgment.

*Appeal from St. Louis Circuit Court.*

*Geo. W. Bailey, pro se.*

*Max Mierson*, for Appellant.

ADAMS, Judge, delivered the opinion of the court.

This was an action commenced before a justice of the peace, where plaintiff had judgment, from which the defendant appealed to the Circuit Court.

During the pendency of the case in the Circuit Court, the plaintiff took a voluntary non-suit, which during the term was, by the consent of the parties, set aside without consulting the sureties on the appeal bond. The case was tried and resulted in a judgment in favor of the plaintiff, which was entered up against the defendant and his sureties in the appeal bond. The defendant and one of the sureties in the appeal bond appealed to the General Term, which affirmed the judgment at Special Term, and they have appealed to this court. No formal assignment of errors has been filed, and the only error assigned in the brief for defendants, and relied on here for reversal, is, that the court permitted the non-suit to be set aside without the consent of the sureties in the appeal bond. It has never been held in this State, that sureties in an appeal bond are parties to the suit, in the sense that they must be consulted in regard to any step taken in the case before final judgment. If there be any substantial defect in the recognizance, they may object to any judgment being rendered against them, or they may appeal from such judgment, and have the point determined by this court.

---

Reinecke v. Jod.

---

The recognizance, required by our statute on appeals from justices of the peace, is to secure to the appellee the payment of any judgment that may be rendered in his favor against the appellant. (See 2 Wagn. Stat., 847, §§ 3, 4; 851, § 23.) It does not contemplate that the sureties in the recognizance shall prosecute or defend the suit, or in any manner interfere with the proceedings during the progress of the case.

Judgment affirmed. All the judges concur.

---

HENRY REINECKE, Respondent, vs. MICHAEL JOD, Appellant.

1. *Practice, civil—Trials—References—Exceptions to report.*—Unless exceptions to a referee's report are allowed, the report should be confirmed and judgment rendered thereon in the same manner and with like effect as upon a special verdict. The case should not be set down for a re-trial by the court.

*Appeal from St. Louis Circuit Court.*

*Thos. B. Childress*, for Appellant.

*Finkelburg & Rassieur*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery, for the settlement of a partnership between plaintiff and defendant.

The petition alleges a partnership in quarrying rock, and in the purchase of a lot in St. Louis for that purpose. The plaintiff bought the lot in his own name for the partnership. The defendant denied that this purchase was for the partnership, and the chief litigation was in regard to this purchase. By consent of parties the case was referred to a referee to report upon, and adjust the partnership accounts between the parties.

The referee made a full and elaborate examination of the whole case as directed by the court and filed his report in

court on the 17th day of October, 1871. The defendant afterwards, on the 11th day of November, filed exceptions to this report, which were by the court overruled, and he excepted to this ruling. The referee found a balance in favor of the plaintiff, and the court confirmed the report, and rendered a judgment thereon in favor of the plaintiff. The defendant afterwards in due time filed a motion for a rehearing, which was overruled, and he appealed to the General Term where the judgment at Special Term was affirmed, and he has appealed to this court.

The main points relied on here are objections to the allowances made by the referee in favor of the plaintiff, as being unsupported by the evidence. It does not appear from the record upon what ground the exceptions to the report of the referee were overruled. The law requires exceptions to be filed within four days in term after the report is filed. (1 Wagn. Stat., 148, § 41.) These exceptions were not filed within the prescribed time, and might have been overruled for that reason.

But I have examined the evidence and find no merit in the exceptions. The defendant also makes the point here, that the case should have been set down for hearing after the report of the referee was made, and the issues re-tried by the court without regard to the report of the referee. That is not the law in this State. Unless exceptions to the report are allowed, the court confirms the report, and judgment must be rendered thereon, in the same manner and with like effect as upon a special verdict. (Wagn. Stat., 148, § 42.)

Let the judgment be affirmed. All the judges concur.

---

Douglas, et al. v. St. Louis Zinc Co., et al.

---

THOMAS DOUGLAS, JR., *et al.*, Respondents, *vs.* ST. LOUIS ZINC  
Co., *et al.*, Appellants.

1. *Mechanic's lien—Attaches, when—Effect of filing demand.*—The right of a mechanic or material man against property subject to a mechanic's lien commences at the time the building is commenced, and the labor or materials are furnished; and for all beneficial purposes the lien commences from that date, and while the claimant cannot enforce his lien against the property until he has complied with the provisions of the statute, still his right to the lien exists from the time that his work and materials go into the building. When the account is filed, the lien relates back to the commencement of the building, and cannot be cut off or divested by any transfer or assignment of the owner after the building is commenced.
2. *Mechanics' liens—Bankrupt act of the United States.*—It was not intended by the United States Bankrupt Law to cut off or destroy liens or vested rights acquired under State laws, but rather to preserve all liens and enforce a distribution of the property of the bankrupt with reference to the rights of all, whether those rights were created by a statutory lien or otherwise. And a person, entitled to a mechanic's lien under the laws of this State, has a right, notwithstanding the commencement of proceedings in bankruptcy, to perform all acts necessary to the final prosecution and perfection of his lien under the statutes of this State.
3. *Mechanics' liens—Bankruptcy—Jurisdiction.*—When the property of a bankrupt under the United States Bankrupt Law is subject to a mechanic's lien, the bankrupt court may order the assignee to sell the property and pay off the lien out of the proceeds, or may order the property to be sold subject to the lien, and in that case the courts of the State whose statute gives the lien, would have jurisdiction to ascertain and enforce the lien against the property, notwithstanding the proceedings in bankruptcy.

*Appeal from St. Louis Circuit Court.*

*Ford Smith*, for Appellants.

I. Under our mechanics' lien law the lien does not attach until the account is filed in the office of the clerk of the Circuit Court. This is evident from an examination of the law. (2 Wagn. Stat., 907.) From the first section it is evident that it was not the intention of the Legislature to give a lien at the time of doing the work. The section expressly provides that something else must be done to place the lien upon the property. Until the provisions of this chapter are complied with, no lien exists. Section 5 of the same chapter recites what provisions of the chapter must be complied with

in order to create a lien. This section also speaks of the lien as not yet in existence. It makes it the duty of every person "seeking to obtain the benefit of the provisions of this chapter," and not of "every person having a lien," to file, &c. He is to file a just and true account of the "demand due him," and not an account of the "items which compose his lien." It is the account which "is to be," not which is, a lien.

Section 8 also provides, that "The petition among other things shall allege the facts necessary for securing a lien under this chapter." Reading these sections together, it is clear that the lien does not attach until the account is filed. Until the account is filed, the contractor is spoken of as having a right to obtain a lien, but not as having the lien.

Section 16 also aids us in the interpretation of the act. Before filing the account, the lien is spoken of as something which "is to be," as something which the contractor "shall have," upon doing something else—as always in the future. But after the account is filed, the language changes. The lien is spoken of as in existence. By section 16 \* \* "no lien shall continue to exist by virtue of the provisions of this chapter for more than ninety days after the lien shall be filed, unless, within that time, an action shall be instituted thereon, as hereinbefore prescribed."

This change in the language of the statute is radical and significant. Before the account is filed, the lien is treated as a thing which a party may obtain by proper action, viz: by filing his account within the prescribed time. After the account is filed, the lien is spoken of as something which the party has. The change is so radical, that it makes the intention and meaning of the Legislature clear.

Other statutes also aid us in the interpretation of this one. Whenever in our statutes it is intended that a lien shall attach upon rendering the services, no such condition is attached. (See "act concerning Boats and Vessels," R. S., 1855, Vol. 1, p. 302-303, ch. 20, § 1. Also see statute concerning lien for "Keeping horses and other animals," 2 Wagn Stat. p. 906, §§ 1-2). Under the act as now in force, this court has decided



that the lien did not attach until the account was filed. (*Stebel vs. Stock*, 31 Mo., 456; *Matlack vs. Lare*, 32 Mo., 262; *Gault vs. Soldain*, 34 Mo., 150, and particularly *In re Dey*, 3 Bank Reg. 81.)

II. The filing of a petition in bankruptcy against a debtor brings his property under the exclusive jurisdiction of the bankruptcy court. (See *Jones vs. Leach*, 1 Bank. Reg., 165; *Pennington vs. Sale*, 11 Bank. Reg., p. 157; *In re Rosenberg*, 3 Bank. Reg., 33.)

III. After the petition in bankruptcy is filed, no lien against the property of the bankrupt can be acquired or enforced by proceedings instituted in any court but the bankruptcy court, in which the case is pending. No other can maintain jurisdiction over the property by proceedings instituted after the petition in bankruptcy is filed. The question here is a question of jurisdiction. It has been established, that the filing of the petition in bankruptcy transferred the property of the bankrupt into the exclusive jurisdiction of the United States District Court, as a court of bankruptcy. It has also been established, that the law does not attach until the account is filed, therefore, no lien could be established or enforced by the State Court, or by proceedings instituted in the State court after the petition in bankruptcy was filed. No principle of law is better settled than, that where one court of competent jurisdiction has obtained jurisdiction over property, no other court can interfere with that jurisdiction, or obtain jurisdiction over the property. (In the matter of *Hellar*, 3 Paige, 199; *Peale vs. Phipps*, 14 How., [U. S.] 368.)

Under the bankrupt act of 1867, the courts, both State and national, have repeatedly held, that after a petition in bankruptcy was filed against a debtor, no court, other than the bankruptcy court, could obtain jurisdiction over, or in any way affect, the property of the bankrupt, by proceedings commenced after the petition is filed. (*In re Barson*, 1 Bank. Reg., 125; *Jones vs. Leach*, 1 Bank. Reg., 165; *In re Wynne*, 4 Bank. Reg., 5.)

The filing of the petition in bankruptcy against the St. Louis Zinc Co. divested the State courts of their jurisdiction over the property of the bankrupt, and made it impossible for a State Court to impose a lien upon its property by any proceedings commenced after the 18th day of November, A. D. 1870. It cannot be said, that plaintiffs were forced to come into the State court for the reason that the bankrupt court could not enforce their lien. By the 1st section of the bankrupt act, jurisdiction is given to the U. S. District Court, as a court of bankruptcy, to "ascertain and liquidate the liens and other specific claims on the property of the bankrupt."

The filing of the petition in bankruptcy gives to the bankrupt court the custody and control of, and jurisdiction over, the entire estate of the bankrupt. That court has full power to distribute that property "so as to secure the rights of all parties, and due distribution of the assets among all the creditors." (Bankrupt Act 1867, § 1; *In re Dey*, 3 Bank. Reg., 8; *Stuart vs. Hines*, 33 Iowa, 160; *Davis' Ass'nee vs. Campbell*, 6 Bank. Reg., 145, 150, 161.)

IV. The orders of the U. S. District Court, copied into the transcript in this case, are simply void. They cannot affect this case in the least. Had the suit been pending in the State court when the petition in bankruptcy was filed, and jurisdiction over the property been then in the State Court, the Federal Court might have given the assignee leave to appear in the State court and defend. But that would have been only a permission granted to one of its officers. It would not thereby affect the jurisdiction over the *rem*, for that would already be in the State court. Permission to the assignee, to defend actions pending when the petition in bankruptcy is filed, is all the U. S. Court can do in regard to suits in other courts. It is all the bankrupt act gives it power to do. (See clause 2, of section 16 of the Bankrupt Act.)

*A. H. Bereman*, for Respondents.

I. From the time the account accrued in August, the lien attached; it was inchoate, it is true, but it was a valid lien. No

---

Douglas, et al. v. St. Louis Zinc Co., et al.

---

sale, *bona fide* by the owner during the six months, can defeat the mechanic's lien, although no claim be filed, and no suit instituted. Section 7 of chapter 195, Gen. Stat., p. 766, provides, that "The lien for work and materials as aforesaid shall be preferred to all other incumbrances which may be attached to or upon such building (and) subsequent to the commencement of such building." Assignees in bankruptcy and in insolvent proceedings are not *bona fide* purchasers. (Kuhleman vs. Scheele, 35 Mo., 142; Gorman vs. Sagrue, 22 Mo., 137; M'Murray vs. Taylor, 30 Mo., 263; Ashdown vs. Woods, 31 Mo., 465). Clearly the lien existed for six months; the institution of suit, and the filing, only prolonged and preserved it.

II. As plaintiff's claim for a lien was purely statutory, he was obliged to follow the statute to obtain the benefit of it. He was bound to file with the clerk, and was bound to commence his suit within the times prescribed, and he could not go into the bankrupt court claiming a lien, until he was able to show he had taken the statutory steps to perpetuate and establish it. "The lien could be enforced only in the State courts, and even after adjudication the lienor has a right to commence suit, when such suit is necessary to keep his lien alive." (Clifton vs. Foster, 3 Bank. Reg., 162; Cole vs. Duncan, Legal News, Chicago, Vol. 3, p. 323; *In re* Cook and Gleason, Bankrupts, 3 Leg. News, p. 410; *In re* McCoulter, 3 Leg. News, 377.)

III. It is clear, plaintiffs did not lose their lien by failing to take the statutory steps to enforce it before proceedings in bankruptcy. The bankrupt act does not necessarily divest the State Courts of any or all jurisdiction; no creditor is compelled to submit to the jurisdiction of the bankrupt courts exclusively. Bankruptcy proceedings may suspend the action of the State Court, but they only suspend temporarily. (Bankrupt Act 1867, §§ 1, 26.) Under this section, it is provided, that no creditor, whose debt is provable, shall be allowed to prosecute to final judgment, until the question of the discharge shall have been determined. The State court, after

all, may, in any disputed case, by leave of the court in bankruptcy, proceed to a judgment. Without this permission the State court could only stay proceedings on application of the bankrupt to await his discharge, and, if he was an unreasonably long time about it, the State Court could proceed with the case without leave of the bankrupt court, and in spite of the opposition of the bankrupt. Most certainly, then, the State Court could proceed with the permission of, the District Court.

VORIES, Judge, delivered the opinion of the court.

This action was commenced in the St. Louis Circuit Court on the 26th day of November, 1870, to enforce a lien of a mechanic or material man against a building and the premises on which it was erected, for materials furnished to be used, and which were used, in the erection of said building.

No objection is made to the petition. The Zinc Company made no answer to the petition. The defendants, Eddy and Martindale, filed a joint answer, in which they denied the allegations of the petition, and also set up by way of defense to the action new matter, of which new matter so set up in defense it is only necessary to set forth, in order to a proper understanding of the case as presented to this court, the following :

The defendants further answering state, that plaintiffs ought not to maintain their suit, for they say, that on the 18th day of November, 1870, a creditor of said St. Louis Zinc Co., in pursuance of an act of Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, duly filed in the office of the Clerk of the District Court of the United States for the Eastern District of Missouri a petition in bankruptcy against said St. Louis Zinc Company, upon which said St. Louis Zinc Company was afterwards adjudicated a bankrupt by said District Court of the United States for said District, and that thereafter John Ford Smith and A. L. Bergfield were duly appointed and qualified as co-assignees of said St. Louis Zinc

Company, and Enos Clark, Esq., a register in bankruptcy in and for said District, by an instrument in writing under his hand and the seal of said court, bearing date the 23d day of December, A. D. 1870, did convey and assign to said Smith and said Bergfeld, as such co-assignees as aforesaid, all the estate, real and personal, of the said St. Louis Zinc Company, including all the property of whatever kind of which it was possessed, or in which it was interested or entitled to have, on the 18th day of November, A. D. 1870; and no suit has ever been brought against said assignees by said plaintiffs, nor have plaintiffs ever made them parties to this suit."

A replication was filed by the plaintiffs to the new matter set up in the answer; to the part of the answer before set out, the plaintiffs replied as follows: "And for further reply, they say, that by order and leave of the United States District Court in and for the Eastern District of Missouri, wherein the said St. Louis Zinc Company was so adjudged a bankrupt, they were permitted, as by the act of Congress of the United States, entitled an act to provide a uniform system of bankruptcy throughout the United States, they might be, to prosecute this, their claim, to final judgment in this court against the said real estate so mentioned in their petition, and so having been assigned to said John Ford Smith and Alfred L. Bergfeld, having been sold by them to the said James P. Beck, subject to this and all other incumbrances and not freed of the liens of creditors therein, as will appear by the order and permission of said court filed in this cause."

On the 30th day of October, 1872, a jury was impaneled and sworn to try the cause, after which the plaintiffs, to sustain the issues on their part, offered to read in evidence a certified copy of an order and entry made in, and by, the District Court of the United States for the Eastern District of Missouri, in the matter or case of Thomas Douglas and Oliver Lobsinger vs. John Ford Smith and A. L. Bergfeld, co-assignees of the St. Louis Zinc Company a bankrupt.

---

Douglas, et al. v. St. Louis Zinc Co., et al.

---

The substantial portion of the order was as follows :

"Tuesday, March 2nd, 1872.

"Now at this day came the plaintiffs by Alvah H. Bereman, Esquire, their attorney, and also the defendants, by John Ford Smith, Esquire, for himself and his co-assignee, and the demurrers to certain parts of the answer of defendants herein, and the motions to strike out certain other parts of the said answer, having been argued by counsel and submitted to the court, and the court being of the opinion, that inasmuch as the property in question was sold by the order of this court subject to all existing mechanic's liens, said property still remains subject to said liens, which liens are enforceable solely in the proper State courts, free from all further control or interference of this court therewith; the custody and control of said property and all rights of the assignees in bankruptcy with respect thereto having been fully divested by the sale aforesaid. It is ordered, that this suit be, and the same is, hereby dismissed, without prejudice to the plaintiffs' rights, if any they have, to enforce their mechanic's lien in any State court having jurisdiction thereof, and it is further ordered, that said plaintiffs pay the costs of this suit, to be taxed, &c."

The defendants objected to the said order being received as evidence in the cause, on the ground that the evidence was incompetent and irrelevant, and because the same could not confer jurisdiction on the court, and because the pleadings show, that at the time of the filing of the lien the property described in the petition had passed out of the jurisdiction of the court. The objection to the evidence was sustained, and the evidence excluded. To which ruling the plaintiffs excepted. The plaintiffs then offered in evidence another order rendered and made by and in said United States District Court in said cause, to substantially the same purport of the one set forth, but upon another motion which had been pending in the cause.

This was also objected to and excluded for the same reasons given for the rejection of the first order, and the plaintiffs again excepted.



---

Douglas, et al. v. St. Louis Zinc Co., et al.

---

The plaintiffs also offered in evidence a certified order of said District court, by which they were specially directed to proceed with their suit in the St. Louis Circuit Court to establish their lien, &c. This was also objected to and excluded for the reasons aforesaid, and exceptions taken. The plaintiffs then offered evidence to prove the allegations in their petition and to sustain their cause of action. The defendants objected to all or any evidence on the part of the plaintiffs, on the ground that the court had no jurisdiction over the cause.

This objection was also sustained and all evidence excluded, and exceptions taken. The court then instructed the jury to find a verdict for the defendants, which was done. The plaintiffs, in due time filed a motion for a new trial, which was overruled by the court, and final judgment rendered against the plaintiffs, from which they appealed to General Term of said St. Louis Circuit Court, where the judgment at Special Term was reversed, and the case remanded for further hearing. From this last judgment the defendants appealed to this court.

The facts shown by the record in this case, and which seem to be conceded by the parties, are about as follows: That the plaintiff sold and delivered to the St. Louis Zinc Company at different times, from the 7th day of March, 1870, to the 27th day of August, 1870, various articles of lumber and material to be used, and which were used, in the erection of a building by said Zinc Company upon the lot or premises described in the petition in this case; that on the 26th day of November, 1870, they filed a true account of said lumber and materials furnished, verified by affidavit as the law directs, with a description of the building and premises to be charged, in the office of the clerk of the Circuit Court of St. Louis County, the same being the county where the premises are situate; that this account was made out and filed in conformity to the law concerning mechanics' liens; that, on the same day of the filing of this account or lien, this suit was commenced in the St. Louis Circuit Court to enforce said lien and collect the account by a sale of the house and premises named in the petition.

---

Douglas, et al. v. St. Louis Zinc Co., et al.

---

It is further shown, that on the 18th day of November, 1870, after the lumber had been furnished and used, and before the account was filed in the clerk's office, a creditor of the St. Louis Zinc Company, in pursuance of the act of Congress concerning Bankruptcy, filed in the proper office a petition in bankruptcy against said Zinc Company, and that said Zinc Company was afterwards in pursuance of said petition adjudicated a bankrupt, and its property assigned to assignees as is stated in the answer. And it further appears, that after the bankruptcy of the Zinc Company the other defendants by purchase or otherwise became interested in the premises against which the lien is attempted to be enforced, and were therefore made parties defendant to the action.

Two questions are raised and argued by counsel for the defendants, Eddy and Martindale, in this court. First, it is insisted, that, as no account was filed as a lien against the St. Louis Zinc Company in the office of the Clerk for St. Louis County until after the filing of the petition in bankruptcy against said company, the assignees of said bankrupt's estate acquired the title to all of the bankrupt's property in the same condition that it was at the time of filing the petition in bankruptcy, and that the right to file the account and enforce a lien against the premises and house, named in the petition, was cut off and lost by the proceeding in bankruptcy. Second, it is contended, that, even if the lien was not lost, the Circuit Court of St. Louis County, after the petition in bankruptcy, had, and could have, no jurisdiction in the matter, but that the plaintiffs' lien could only be adjudicated and enforced in the District Court having charge of the proceedings in bankruptcy.

The first position taken by the defendants depends upon a proper construction of the statute of this State concerning liens of mechanics and those furnishing materials for builders, &c. (Wagn. Stat., 907.) The first section of that act provides, that "every mechanic or other person who shall do or perform any work or labor upon, or furnish any materials, fixtures, engines, boiler or machinery for any building, erection, or improvements upon land, or for repairing the same, under

---

Douglas, et al. v. St. Louis Zinc Co., et al.

---

or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this chapter, shall have, for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished, a lien upon such building, erection or improvements, and upon the lands belonging to the owner or proprietor, upon which the same are situated, to the extent of one acre, &c."

The 3rd section of the same act provides, that "the lien for the things aforesaid, or work, shall attach to the buildings erections, or improvements, for which they were furnished, or the work was done, in preference to any prior lien or incumbrance," &c.; and said section further provides that the buildings may be sold separate from the land in case of a prior incumbrance, and the purchaser may remove the building from the land.

By the 5th section it is provided, that "it shall be the duty of every original contractor within six months, and every journeyman and day laborer within thirty days, and of every other person seeking to obtain the benefits of the provisions of this chapter within four months, after the indebtedness shall have accrued, to file with the Clerk of the Circuit Court of the proper county a just and true account of the demand due him or them, after all just credits have been given, which is to be a lien upon such building or other improvement, and a true description of the property upon which the lien is intended to apply, &c.

It is also provided by the 16th section of the act, that all actions commenced for the enforcement of liens under said law shall be commenced within ninety days after filing the lien.

Now it is contended by the defendants, that it is the filing of the account in the clerk's office which constitutes the lien, and that up to that time no lien exists; and as that was not done in this case until after the commencement of the proceedings in bankruptcy against the Zinc Company, the property passed to the assignees of the bankrupt without any reference

to the lien, and that none could afterwards be created. I do not think that this is a proper construction of the statute. If the filing of the account is construed to be the creation of the lien, and not merely a means used and required for its enforcement, so as not to be burdensome to others, then there are other sections of the statute which would be wholly inconsistent with the position taken by defendants.

The 7th section of the statute provides, that "the lien for work and materials as aforesaid, shall be preferred to all other incumbrances which may be attached to or upon such buildings, bridges or other improvements, or the grounds, or either of them, subsequent to the commencement of such buildings or improvements."

The 19th section provides, that "every person except the original contractor, who may wish to avail himself of the benefits of the provisions of this chapter, shall give ten days notice before filing the lien, as herein required, to the owner, owners or agents, or either of them, that he or they hold a claim against such building or improvements, setting forth the amount and from whom the same is due."

The 22nd section provides, that "the liens for work and labor done or things furnished, as specified in this chapter, shall be upon an equal footing, without reference to the date of filing the account or lien, and in all cases where a sale shall be ordered, and the property sold, which may be described in any account or lien, the proceeds arising from such sale, when not sufficient to discharge in full all the liens against the same, without reference to the date of filing the account or lien, shall be paid *pro rata* on the respective liens; provided such account or liens shall have been filed and suit brought as provided by this chapter." It is also provided by the statute, that suit shall be brought for the enforcement of the lien in ninety days after filing the account, &c. It will be seen from these provisions of the statute, that while the lien secured by the statute is incomplete and cannot be effectually enforced without the filing of the account, and the commencement of an action; yet the right of the claimant commences

at the time the building is commenced, and the labor or materials are furnished, and for all beneficial purposes, the lien commences from that date; and while the claimant cannot enforce his lien against the property until he has complied with all of the provisions of the statute, still his right to the lien exists from the time that his work or materials go into the building. It requires no further contract, consent or agreement on the part of the owner of the building or lands, or of his assignees after the commencement of the building, to confer a right on the claimant to perfect and enforce his lien against the property. The right is vested in the claimant to file his account and enforce his lien without the consent or concurrence of any one, and, although these things are required by the statute in order to an enforcement of the lien, yet they do not originate the right to the lien—the right growing out of the contract to furnish the material and its use in the building or erection. Therefore, when the account is filed, the lien relates back to the commencement of the building, and cannot be cut off or divested by any transfer or assignment of the owner after the building is commenced. This view of the law is fully sustained by the case of *McGready vs. Harris*, decided by this court at the October term, 1873, 54 Mo. 137; and the same thing was held by this court, under a statute substantially the same as the present statute, in the case of *Kuhlemann vs. Schuler*, (35 Mo., 142,) and also in the case of *Clifton vs. Foster*, assignees, in Massachusetts, and reported in 3 Bank. Reg., 162; see also *In re J. M. Coulter* in bankruptcy in the District Court of Oregon, 3 Chicago Legal News, 377.

Cases may be found, that seem to hold a contrary view, of statutes nearly similar to ours, but we think the above view of the law comports with the evident intention of the Legislature, and it is very evident that it was not intended by the bankrupt act to cut off or destroy liens or vested rights acquired under the State laws, but rather to preserve all liens, and enforce a distribution of the property of the bankrupt with reference to the rights of all, whether those rights were

created by a statutory lien or otherwise. We therefore think, that the plaintiffs had a right, notwithstanding the commencement of the proceedings in bankruptcy, to perform all acts necessary to the final prosecution and perfection of their lien, and which are required by the statute of the State.

The second point made by the defendants is, that although the lien of the plaintiffs was not lost by the commencement of proceedings in bankruptcy against the Zinc Company, still that the St. Louis Circuit Court had no jurisdiction over the matter, but that the rights of the parties could only be adjudicated in the United States District Court having charge of the proceedings in bankruptcy. In reference to this question this case is almost identical in all its essential particulars with the case before referred to, decided by the Supreme Judicial Court of Massachusetts, reported in 3rd Bank. Reg. 162. Grey, Justice, in delivering the opinion of the court in that case, uses this language: "Under the provisions of the bankrupt act already cited, the court of the United States sitting in bankruptcy may indeed authorize the assignee to redeem the property, and discharge the lien, or they may order the entire property to be sold, and ascertain the amount of debt secured by the lien, in which case the debt would be preferred in the distribution of the proceeds, and the purchaser of the estate would take it discharged of all incumbrance.

\* \* \* But on the other hand, those courts may in their discretion, without investigating the validity or the extent of the lien, allow the assignee to sell the property subject to the lien, and the bankrupt's estate to be finally settled without any determination of the rights claimed under the lien; in which case the petitioners would retain those rights as against the purchaser of the property. \* \* \* If the courts of the United States sitting in bankruptcy should abstain from ascertaining the amount of the lien, and providing for its satisfaction out of the property or the proceeds of a sale thereof, the only way of enforcing it would be under the present petition. The rights of the creditor will be preserved, and all interference with the custody or the jurisdiction of the Na-



---

Douglas, et al. v. St. Louis Zinc Co., et al.

---

tional courts avoided, by ordering this petition to stand continued in the Superior Court to await the result of the action of the courts of the United States in the proceedings in bankruptcy."

In this case the plaintiffs offered in evidence a transcript from the records of the court in bankruptcy, by which they proposed to prove, as they had alleged in their replication, that they had attempted to litigate their demand, and enforce their lien, in the bankrupt court against the assignees of the St. Louis' Zinc Company in bankruptcy; that that court had ordered the property to be affected by the plaintiff's lien to be sold by the assignees in bankruptcy, and that the property had been so sold subject to plaintiff's lien, after which the proceedings on the part of the plaintiffs in the bankrupt court had been dismissed, and plaintiffs ordered, by an order of said court, to proceed in the courts of this State to establish and enforce their said lien. All of this evidence was rejected by the court trying this cause, and all other evidence tending to prove the plaintiff's case was also rejected, on the ground that the State Courts had no jurisdiction of the cause. This we think was erroneous. We can see no reason why the court could not, after the property had been disposed of in the bankrupt court, subject to the lien of the plaintiffs, and all of the proceedings dismissed therefrom, proceed to try the cause and determine the rights of the parties.

The judgment of the Circuit Court at General Term will be affirmed, and the case remanded to Special Term for further proceedings. The other judges concur.

MARY E. JONES *et al.*, Respondents, *vs.* JOHN C. CARTER,  
Appellant.

1. *Administration—Real estate, sales of—Deeds, description in—Sheriff's sales.—*

A sale of real estate by an administrator is *in invitum* as to the heirs, who are the real owners. He exercises a statutory power under the orders of the Probate Court, and the principles which apply to sheriffs' sales as to the description of the property to be sold, apply to administrators' sales.

2. *Administrator—Real estate, sales of—Conveyance—Indefiniteness of description of land.—*In a deed to real estate made by an administrator, he described the land as 320 acres of land, "being parts of lots No. 6 and 12." In reality, lot 6 contained 173 acres and lot 12, 374 acres. *Held*, that the deed was void for uncertainty in the description.

*Appeal from St. Louis Circuit Court.*

C. M. Napton, and Fagg, Dyer & Briggs, for Appellant.

I. If the tract—lots 6 and 12—contain more than 320 acres, this deed would convey so much or such a proportional interest as 320 is to the full number. Such a deed is good *inter vivos*. (Pipkin's Case, 29 Mo., 229; 82 Mass., 155; 7 Wend., 136; 14 Wend., 619; 46 Mo., 434; 3 Mass., 352; 1 Washb. Real Prop., 568.)

II. The reasons, which make such a deed by a sheriff void, (3 Mo., 579,) do not apply to this deed. The sheriff's sale is *in invitum*, and not a sale made under the order of a court, or by a court acting through its officer, the administrator.

III. It would be inequitable to allow the heirs to regain the lands freed from debts, and also recover of us, who lifted the encumbrance, \$600 damages for doing so.

IV. The two deeds ought to be considered together, and if so considered, would certainly convey the whole lot. (6 Cowen, 706; Orrick vs. Bower, 29 Mo. 210.)

V. See also Davis vs. Rainsford, 17 Mass., 210; Wolfe vs. Scarborough, 2 Ohio [N. S.], 361.

E. P. Johnson, for Respondents.

I. These deeds are void for uncertainty. (Clemens vs. Rannels, 34 Mo., 579; Peck vs. Mallams, 10 N. Y., 509; Campbell vs. Johnson, 44 Mo., 247; Holme vs. Strautmann, 35 Mo., 302.)

---

Jones, et al. v. Carter.

---

II. The cases cited by appellant's counsel have no application whatever in this case, as they were decided *inter partes* on an execution of a power.

III. There is no difference in this respect between a sheriff's deed and one by an administrator. (Speck vs. Wohlein, 22 Mo., 310.)

IV. No equitable construction can be placed upon deeds by administrators, or those executed under statutory powers. (Allen vs. Moss, 27 Mo., 364; Haley vs. Bagley, 37 Mo., 363; Wannall vs. Kem, 51 Mo., 150.)

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment for a tract of land in Pike county, where this suit was originally commenced. The case was afterward taken by change of venue to the Circuit Court of St. Louis county. The land in controversy was a portion of lot No. 12 of a league square of land, formerly owned by Luke Hoff, Senior, being United States Survey numbered sixteen hundred and eighty-five, in Township fifty-two North of Ranges one and two West, as the same was divided by commissioners under the will of said Luke Hoff among his heirs or devisees. The commissioners under Hoff's will divided the league square of land into thirteen lots, commencing with No. 1 and running to No. 13. Lot No. 12 was in the southwest part of the league square and lot No. 6 was in the north-eastern part of the league square, and those two lots were two or three miles apart.

Both parties claim title under Charles E. Perkins, as the common source. The plaintiff, Mary E. Jones, is the wife of her co-plaintiff, Henry E. Jones, and was the sole heir at law of Charles E. Perkins, who died seized of the land in dispute, and as heir at law she claims the land.

The defendant claims under two administration sales made by the administrator of Charles E. Perkins, deceased, for payment of his debts.

These administration sales and deeds were held to be void by the Circuit Court, on account of the uncertainty in the de-

scription of the premises sold and conveyed; and this ruling of the Circuit Court raises the only question for our consideration.

The first administrator's sale was of three hundred and twenty acres, which had been appraised at \$2.00 per acre, or \$640.00, and was sold to Jas. W. Campbell, for \$162.00, at public auction.

The description of this land, in the proceedings had in the County Court for the sale thereof and in the administrator's deed, was as follows: "Three hundred and twenty acres of land, being a part of a league square, formerly owned by Luke Hoff, Sen., deceased, known as survey No. 1685, in township 52, ranges 1 and 2 west, being parts of lots No. 6 and 12 of said league square, as the same was divided among the heirs of said Luke Hoff."

The plat, which was made by the commissioners under the will of Luke Hoff, deceased, dividing the league square among his heirs, shows that lot No. 6 contains 173 acres, and lot No. 12 contains 374 acres, and that these two lots are two or three miles distant from each other.

It is obvious, that the description used in the administrator's deed, and in all the proceedings for the sale of the three hundred and twenty acres, was so indefinite, that the land could not be located at all. It is not shown how much was in the lot, or in what part of the lots the tract intended to be sold was located. It was too much to be all located in lot No. 6, and not enough to comprehend all of lot No. 12. If it had been confined to lot No. 12, still there was nothing to identify the part of this lot to be covered by the three hundred and twenty acres. The question is not, whether this description would have been valid, if used in a deed between living parties, to pass any interest in the land, but whether an administrator can sell the real estate of his intestate, by a description so indefinite as not to designate the land, or indicate the means by which it may be fully identified. The administrator does not act as owner of the land nor as representative of the intestate, in the sale of his lands. Real es-

tate, at the death of an intestate, descends to, and vests in, his heirs at law. A sale by an administrator is *in invitum* as to the heirs, who are the real owners, and the administrator merely executes, under the orders and the judgment of the court having probate jurisdiction, a statutory power, by virtue of which the title of the heirs is divested for the payment of the debts of the deceased. An administrator in this respect acts precisely in the same capacity as a sheriff in the sales of land on execution; and the same principles in regard to the description of the property to be sold, ought to apply to both. A sheriff has no right to sweep away a debtor's property by a description that does not advise the bidders what they are buying. (Clemens vs. Rannells, 34 Mo., 579.) For these reasons, the administrator's deed to Campbell was void.

The second administration sale consisted of thirty-five acres and one rood, which was sold to Aaron McPike, for \$52.87½ and is described as follows, in the administrator's deed, etc., "said thirty-five acres and one rood of land is situated in lot No. 12, above mentioned," "it appearing by the plat and certificate from the recorder's office of Pike county, that the said thirty-five and a quarter acres is all the remaining land mentioned in said order of court as belonging to said estate, which had not been previously sold, and that the same lies in lot No. 12 above mentioned." The plat referred to is simply a plat of lot No. 12, with the courses and distances of the boundary lines, and these thirty-five acres and one rood are not laid down on the plat, and there is nothing in the plat, or in any of the proceedings for the sale of the land, to designate in what part of lot No. 12 the 35½ acres lie. It is therefore subject to the same objections as the sale of the three hundred and twenty acres, and the sale and deed to McPike was void, for uncertainty in the description of the premises sold and conveyed.

Judgment affirmed. Judge Napton, having been of counsel, did not sit; the other judges concur.

---

 Primm, et al. v. Raboteau, et al.
 

---

CHARLES H. PRIMM, *et al.*, Appellants, *vs.* JUNIUS B. RABOTEAU, *et al.*, Respondents.

1. *Practice, civil—Trials—Testimony—Objections to—Grounds must be specifically stated, in legal or equitable actions.*—The rule requiring the grounds of objections to testimony to be specifically stated, applies alike to legal and equitable actions; and objections, the grounds of which are not specifically stated, are properly disregarded by the court.
2. *Land and land titles—Equity—Bill of Peace.*—Where the correctness of a particular boundary line between two tracts of land has been thoroughly and satisfactorily tried in a number of actions, extending through a considerable time, and the verdict and judgment have always been in favor of the correctness of such boundary; equitable relief will be properly granted at the instance of the persons maintaining the correctness of said boundary, by enjoining its assailants from further vexing and harrasing those asserting it by a suit at law; and this, even if the said actions so tried did not involve the same pieces of ground; provided they involve the same boundary and were between the same parties or their privies in estate.
3. *Res adjudicata—Practice, civil—Tenants in common—Privy.*—Under the above detailed circumstances, the personal participation of a party in the previous litigation is wholly immaterial, provided his title hangs by the same thread, and depends on the same facts, as that of his co-claimants.
4. *Land and land titles—Boundaries—Words of description.*—The words "the middle of the natural channel of the creek, when the pond is exhausted," mean the position of the thread of the creek when the pond was actually exhausted. (Primm vs. Walker, 38 Mo., 91; Mincke vs. Skinner, 44 Mo., 92, affirmed.)
5. *Land and land titles—Boundaries—Equity.*—*Semble*, That equity will interfere to ascertain and fix boundaries where the rights of a large number of persons are affected and a confusion of boundaries has been occasioned by a lapse of time, accident or mistake, and a necessity therefore arises to adjust such conflicting claims and thus prevent interminable litigation.
6. *Equity—Bill of peace—Boundary.*—Where a court of equity grants relief in response to the prayer of a pleading in the nature of a bill of peace it may effectuate its decree in their behalf, by requiring a disputed boundary to be surveyed and marked in a permanent manner.

*Appeal from St. Louis Circuit Court.*

J. W. Skinner and W. C. Jones, for Appellants.

I. The court has no power, by decree, to establish a boundary line. The statute provides a way for restoring lost boundaries, and a court cannot make new laws to supersede the statute. If the bed of the creek exists where defendant says it does, it is a fact needing no assistance from a court of equity. If it does not, and did not exist there naturally in



1851, the court cannot put it there by a decree. The court has no legislative power to create it. The existence of it was a fact to be found and best ascertained by a trial. If that had been tried by the new evidence, and between the new parties, and plaintiffs had failed, the way would have been open to enforce the injunction.

II. There was no privity of estate between John P. Reily or Octavia Warren and any of the parties to the records offered in evidence. Privity of estate, says Bouvier, exists when a relation is established like that of landlord and tenant, or grantor and grantee. "The term privity," says Greenleaf, (1 Ev., p. 216, § 199) "denotes mutual or successive relationship to the same rights of property, and privies are distributed into several classes according to the manner of this relationship. . Thus, then, are privies of estate, as donor and donee, lessor and lessee, and joint tenants, etc." But the relations of donor and donee, or grantor and grantee, do not exist between John P. Reily or Octavia Warren and any of the other parties to this action. Their titles are independent of each other. (4 Kent, p. 368.)

J.P. Reily and Octavia Warren and the parties plaintiff in the preceding suits were not joint tenants of the land in question, for joint tenants are closer allied than tenants in common. To constitute the estate of joint tenancy there must be unity of interest, title, time and possession, that is, that each and all of the said joint tenants must have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. Joint tenants are persons who own "land by a joint title, created expressly by one and the same deed or will," and hold uniformly by purchase. (2 Blackst. Com., 180; 4 Kent, 357.)

The relation of joint tenants never existed between John P. Reily and Octavia Warren, and the other appellants herein. Their titles are diverse in time, duration, etc. No dower is allowed in joint tenancy. The court therefore erred in permitting even these records to be read against them,

there being no privity in estate between said parties and said Reily and Warren; and they are, therefore, not bound by the prior judgments. (1 Stark. Ev., 59, *et seq.*; 1 Greenl. Ev., § 174, *et seq.*; Br. Leg. Max., "*Res inter alios acta.*")

Between tenants in common there is no privity in estate. (4 Kent, pp. 359, 367.)

There has been no judgment against Octavia Warren and John P. Reily—not one judgment against their privies in estate, and one judgment in their favor.

*T. T. Gantt, with whom was John F. Lee, for Respondents.*

I. It is well settled, that whenever any fact has once been judicially determined between A and B, it is at rest for ever. Neither party can afterwards reagitate it. (Miles vs. Caldwell, 2 Wall., 35; Outram vs. Morewood, 3 East., 345; Gardner vs. Buckbee, 3 Cow., 120; Doty vs. Brown, 4 Comstock, 71; Kitchen vs. Campbell, 3 Wilson, 304; Betts vs. Starr, 5 Conn., 550; Kent vs. Kent, 2 Mass., 338; Burt vs. Steinburgh, 4 Cowen, 55; Beebe vs. Elliott, 4 Barb. 457; Shode vs. Seaton, 2 Crompton, M. & R., 728; 1 Cow., 120; 3 Wils., 304.)

These authorities show not only that a judgment between A and B was conclusive as to the matter of the judgment itself, but that if any particular facts which contributed to the judgment, were put in issue between the litigants though not mentioned (or even mentionable) in the judgment, its determination was conclusive.

SHERWOOD, Judge, delivered the opinion of the court.

This was an action of ejectment. The answer of the defendants was in the nature of a bill of peace. The claim of the plaintiffs is based on a deed for lot No. 3 made to Thos. Ingram on the 6th day of September, 1832, by the commissioners of partition sale of Auguste Chouteau's estate; and the defendant's claim under a deed made by such commissioners on the same day to Jonas Newman, conveying to him lot No. 20. Ingram and Newman thus becoming the purchasers

respectively, of those lots, which were situated on opposite sides of what was called "Chouteau's Pond." In each case, the boundary on the water side was "the middle of the natural channel of the creek when the pond is exhausted." As the above mentioned deeds show, the lots therein described were sold subject to the right and privilege of the purchasers of lot No. 9, their heirs and assigns, to keep up the mill-dam of the pond to its then existing height, and the pond full of water to its utmost height, for the use of the mill then erected, and for all other purposes to which the water might be lawfully applied, forever.

The court, at the instance of the defendants, and against the objections of the plaintiffs, heard and determined the allegations of the answer and the issues raised thereby, and entered a decree in behalf of the defendants as follows:

"This cause having been heretofore, to-wit: at the October Term of 1871, of this court, fully heard on the pleadings, exhibits and proof, and the same being by the court here maturely considered and fully understood, for that it appears to the court here that the controversy between the said plaintiffs and the said George Mincke, his tenants and vendees in the present suit respects the location of the channel of the creek of Chouteau's Pond in its natural bed when the pond was exhausted, and that said channel constitutes the boundary between lot No. 3 sold by the commissioners appointed to make partition of the estate of A. Chouteau to Thomas Ingram by deed dated Sept. 6, 1832 and lot No. twenty (20) sold by the same commissioners to Jonas Newman, by deed of same date, the plaintiffs in this action being the legal representatives of the said Thomas Ingram, and the defendants being the legal representatives of the said Jonas Newman; that the said controversy has been pending at various times in courts of competent jurisdiction, between the said plaintiffs and the said defendants, or their privies in estate since the year 1856; that in the interval between the year 1856, and the commencement of this action, the said controversy has been submitted to six different juries, in actions wherein the said plaintiffs or their privies in estate were par-

ties, and opposed to the said defendants or their privies in estate; that on two occasions the said plaintiffs voluntarily became non-suit, after all the testimony had been submitted, and that on four other occasions there were verdicts all concurrent against the said plaintiffs or their privies in estate, and in favor of said defendants; that on each occasion the correctness of the location of the channel of the said creek of Chouteau's Pond as the same was found by Cozzens, Hyer and Shultze on actual survey in 1851, when the pond was exhausted, was drawn in question; the said plaintiffs or their privies in estate denying the correctness of said location and the said Mincke and others, defendants, asserting the correctness thereof; that on each of said four occasions the matter of fact of the correctness of said locations was found by the jury in favor of said defendants and their privies in estate, the last of which verdicts was rendered in June, 1869; and that the said plaintiffs seek by this action to re-agitate the question of the correctness of said location. It is, thereupon, ordered adjudged and decreed, that the following described line be established and declared, as the ascertained, proved and determined boundary between the said lot three (3), sold and conveyed as aforesaid to Thomas Ingram, and lot twenty (20) sold and conveyed as aforesaid to Jonas Newman by the commissioners appointed to make partition of the estate of A Chouteau in 1832, that is to say: a line beginning at a point in the south line of Clark Avenue at a distance eastwardly from the eastern line of Tayon Avenue, of one hundred and four feet six inches, (104.6,) thence running southwardly two hundred and fourteen feet and three inches (214.3), to a point on a line parallel with Clark Avenue, and two hundred and twelve feet six inches (212.6), south thereof at a distance from Tayon Avenue, eastwardly, of one hundred and fifteen feet (115), thence southeastwardly to a point in the north line of Spruce street one hundred and sixty-seven feet, eleven inches (167.11), and thence continuing the same course to a point in the north of Poplar street, three hundred feet east of Tayon Avenue. And that said boundary line so deter-

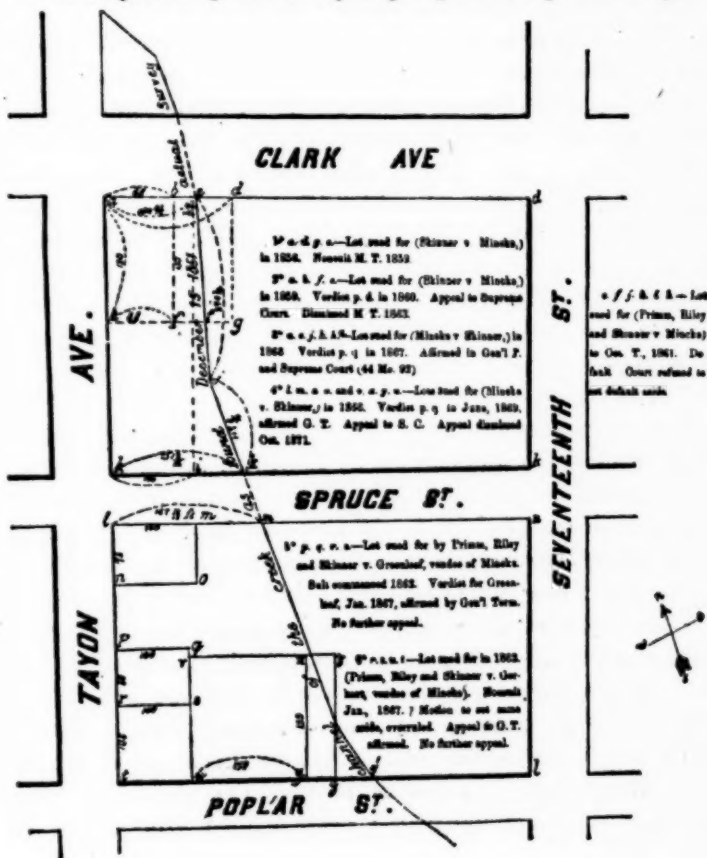
mined be surveyed and marked in a permanent manner by William H. Cozzens, surveyor, and that he make a return to this court of such survey with a plat thereof, with all convenient speed, and that the said plaintiffs and their privies, in estate and each of them be perpetually enjoined, restrained and prohibited from further vexing, harassing or disturbing by suit or action at law or in equity, the said George Mincke or any one claiming under him, as to their possession of the land bounded on the north by Clark Avenue, west by Tayon Avenue, south by Poplar street, and east by the said boundary line so ascertained and determined and surveyed," etc., etc.

The evidence offered on the part of the defendants in support of the allegations of their answer, consisted chiefly of the records and bills of exceptions of the former trials referred to in the decree, and the plats, deeds, depositions, testimony, etc. etc., preserved in such bills and used at such former trials. The plaintiffs objected to the introduction of this evidence, but, no grounds being stated for such objections, they were by the court properly disregarded. The rule as to the necessity of making specific objections to the introduction of testimony is precisely the same whether the proceeding had looked to the enforcement of legal or of equitable rights. (*Margrave vs. Ausmuss*, 51 Mo., 561, and cases cited.)

But even had there been no lack in the plaintiff's objections in this particular, they were still properly overruled, as the evidence sought to be excluded was perfectly competent and sustained in their fullest extent the allegations of the answer, and the finding of the court as set forth in the decree. Up to the time of the trial of this cause, litigation in the form of suits in ejectment, in which the controversy hinged upon what was the correct boundary between lot 3 and lot 20, had been in progress in the court below between most of the present plaintiffs, and all of the present defendants, or those under whom they claim, with the same unvarying result; that is, a verdict and judgment in favor of the defendants, or their privies in estate, whenever such result had not been forestalled by a voluntary non-suit. And in each

of the cases tried, the evidence in all of its essential features has been precisely the same; settling beyond any reasonable doubt, the correctness of the location of the water boundary of the above mentioned lots as ascertained by the surveyors employed for that purpose in 1851. After a title involving directly the correctness of one and the same boundary, has been for *thirteen years* as thoroughly and satisfactorily tried in the courts as this one, it would seem high time for equitable interposition in response to the prayer for relief in the present case. (2 Sto. Eq. Jur., § 859.)

*The subjoined plat more fully explains my meaning.*





And it does not matter that precisely the *same piece* of ground should have been in suit in each instance; it is enough that the title of defendants or their privies in estate to lot 20, and as to what was the common water boundary between that lot and lot 3, were always the question, passed upon and adjudicated, and that successive juries by their verdicts invariably determined that the particular parcel of ground sued for, was part of lot 20 and not of lot No. 3. (State to use, etc. vs. Coste, 36 Mo., 437, and cas. cit.; Doty vs. Brown, 4 Comst., 71; Gardner vs. Bucklee, 3 Cow., 120; Kitchen vs. Campbell, 3 Wils. 304; Miles vs. Caldwell, 2 Wall., 35.)

But it is urged by appellants that inasmuch as John P. Reilly, one of the plaintiffs, and a minor, was never a party to any of the prior actions of ejectment, consequently the question in issue, has, as between him and Mincke or Mincke's privies, never been adjudicated. It is, however, sufficient to observe on this point, that he is a tenant, or more properly, a claimant in common with Skinner and others his co-plaintiffs, and that the right of the defendants or their privies to the property in dispute, has been, as heretofore stated, after repeated and satisfactory trials, fully established at law, and against such co-plaintiffs; and, therefore, Riley's *personal participation* in the previous suits is a thing of no importance, as his title hangs upon the same thread, and is dependent on the same facts, as that of his co-claimants, and has been incidentally and necessarily subjected to the tests of the concurring verdicts rendered against those, who in conjunction with him, lay claim to the property in dispute; and the same remarks are applicable to the claim of Mrs. Warren.

Were the rule otherwise than as above stated, it would be in the power of a number of persons claiming under the same deed, by bringing in turn, each in his own behalf, a series of actions of ejectment to harrass the defendant interminably, and thus defeat the beneficent purpose which gave origin in courts of equity, to bills of peace. So then, there was no error in holding that defendants were entitled to the relief granted, even against *him*, nor in ad-

mitting in evidence the records of previous suits between defendants or their privies with his co-plaintiffs. This view of the subject, renders an expression of opinion on the point argued by counsel, as to whether an infant who unites with adults in a pleading, is equally with them concluded thereby, unnecessary.

The proper construction to be given to the words contained in the deeds from the commissioners in partition of Auguste Chouteau's estate, "the middle of the natural channel of the creek when the pond is exhausted," has heretofore received the consideration of this court; (Primm vs. Walker, 38 Mo., 97; Mincke vs. Skinner, 44 Mo., 92) and the conclusion then arrived at, that those words meant the position of the thread of the creek when the pond was actually exhausted, will not now be departed from. But even were we inclined to question those decisions, it might well be presumed in the absence of aught in the record to the contrary, that the natural channel of the creek, when the pond was exhausted in 1851, and as marked and located in that year by Cozzens, Shultze and Hyer, remained as it was prior to the erection of the dam.

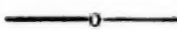
Again the decree entered in the court below, may *probably* be upheld on this additional ground: That equity will interfere to ascertain and fix boundaries, where the rights of a large number of persons are, as in the present case, affected, and a confusion of boundaries has been occasioned by lapse of time, accident or mistake, and a necessity arises therefrom, to adjust such conflicting claims and thus prevent interminable litigation. (1 Story Eq. Jur., § 621.)

And the jurisdiction of courts of equity in this regard, being an *ancient one*, is not curtailed or destroyed by reason of the enactment of a statute of this State for the perpetuation of boundaries, as no words in preclusion of equitable interference are employed in the acts referred to. (1 Sto. Eq. Jur. § 64 i. 80, 11th. Ed.)

But without expressly holding this a case in which equity ought to interfere, because of confused boundaries, it is suffi-

cient to say that the court below, having found the allegations of the answer true, and that in consequence, the relief therein prayed for ought to be granted, was fully warranted in making its decree in that behalf effectual, by directing that the disputed boundary be surveyed and marked in a permanent manner, thus putting forever at rest a subject of *chronic contention*.

Judgment affirmed; Judge Napton did not sit; the other judges concur.



JAMES A. HUSTON, Respondent, vs. FORSYTH SCALE WORKS,  
Appellant.

1. *Contracts—Action for breach of—Evidence not admissible to show a different breach from that set up.*—Where suit is brought for damages for a specified breach of contract, evidence of a different and additional breach is not admissible.

*Appeal from St. Louis Circuit Court.*

Leverett Bell, for Appellant.

T. A. Russell, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This action was for damages for a breach of an alleged contract of hiring, set out in the petition in the following words: "That on or about the 25th of September, 1871, plaintiff and defendant entered into a contract whereby it was stipulated by and between plaintiff and defendant, that plaintiff should serve defendant for one year from said date in the capacity of manager and superintendent of the business house of defendant, then just established in the city of St. Louis; and that in consideration thereof, the defendant agreed and promised to pay plaintiff the sum of two thousand dollars for said year's service." The breach stated was the discharge of plaintiff on November 30th, 1871, from the service of defendant; and damages for the breach were asked.

The answer denied that any contract for a year's service had been entered into between the parties; and alleged that about December 5th, 1871, plaintiff was discharged from defendant's service because he had become an habitual drunkard.

There was a reply denying the affirmative matter contained in the answer.

The plaintiff was the only witness examined upon the trial; and his testimony in full as preserved in the bill of exceptions was in the following words:

I am plaintiff in this cause. I was a member of the firm of Forsyth, Huston & Co., who sold out to the defendant. William Means was President, and Lewis was Superintendent of the Forsyth Scale Works, the defendant. They came here to buy out the business of Forsyth, Huston & Co., in the fall of 1871, about 16th to 18th of September. On the second day after they came, Means, the President wrote on a slip of paper and handed to me the following: "We would like a proposition from Mr. Huston for his services." Next day, Lewis said to Means: "Have Huston and you settled on a salary yet?" He said, "No!" I then said, "My price is \$2,500 a year." This was about the 16th to the 18th of September. The next day Means and Lewis left for Cincinnati. The next I heard from this matter was about the 22d or 23d, when Mr. Clendenin came out as the book-keeper and financial agent of the house. He brought a letter from Mr. Means, which he handed to me. The letter was in words and figures as follows:

CINCINNATI, September 21, 1871.

JAMES A. HUSTON, Esq., St. Louis, Mo.

Dear Sir: Mr. Lewis and I have signed the paper in accordance with the terms proposed, and Mr. Clendenin will close up the matter for us. I think Mr. C. should do as much office business as possible, and get familiar with that department, as a person of your experience should not be confined too much to the details of an office and books. Mr. Lewis and I have decided that we prefer you to wind up the business of F. H. & Co., and to continue in the management of the St. Louis house, but in consideration of our misfortunes and

---

Huston v. Forsyth Scale Works.

---

present poverty, cannot afford to pay you over the rate of 2 M. per annum for your services. If Mr. Garrison and myself succeed in organizing a new concern at St. Louis as proposed, I hope to make you more favorable terms. With kind regards to Mrs. Huston, I remain

Truly yours,

WILLIAM MEANS.

On receipt of this letter we began to take account of stock of old house, and turned it over to the new house, and on the 25th, the new house began, and on that day I began work as manager or superintendent of the new house under the contract as stated in the letter. Clendenin was book-keeper and managed the finances. I continued in the employ of defendant to December 5th, at which time I was discharged. Mr. Clendenin paid me. (Here plaintiff offered to prove that his salary was not paid in full up to the date of his discharge, to which proof defendant objected, and his objection was sustained, and thereupon plaintiff excepted.) I was discharged by a letter from the President, Mr. Means. Mr. Clendenin handed me the letter. I took a copy and handed it back to Mr. C., who kept it. (A copy of the letter was then read in evidence against defendant's objection, and an exception saved, which copy was in the following words):

CINCINNATI, November 29th, 1871.

C. A. CLENDENIN, Esq., St. Louis, Mo. :

Dear Sir: I have a communication from Jas. A. Huston, declining my proposition to pay him at the rate of \$1,000 per annum for employment by this company. His services thereafter, if any, would be consequently without any arrangement on our part, as his refusal to accede to our terms releases him from our employment. You will take charge in the absence of further instructions, and manage our affairs in St. Louis for the best interest of the company.

WILLIAM MEANS,

Pres't Forsyth Scale Works.

After December 5th, the date I was discharged, I made my appearance at the house every day till about the 20th of December. After that I took a trip to Kentucky. I moved to

that State about the 20th of March, and on the 1st of April, 1872, went into business at \$75 per month, and continued at it at that rate until now.

There was no other testimony in the case, whereupon, on defendant's motion, the court instructed the jury, that under the evidence, plaintiff was not entitled to recover.

Plaintiff duly excepted and suffered a non-suit with leave, etc., and moved to set the same aside. His motion was overruled, and he appealed to General Term, where the judgment was reversed, to which defendant duly excepted and appealed to this court.

There is not a particle of testimony in this case, to even remotely indicate, that plaintiff was employed, or his services engaged for the term of a year, or for any definite period. But on the contrary, the only tendency of the testimony adduced was to show that he was temporarily employed at the rate of \$2,000 per year, and afterwards declined a proposition from the president of defendant to continue in such employ, at a lower figure, viz.: at the rate of \$1,000 per annum.

The offer of plaintiff to prove that he had not been paid up to the date of his discharge, met with the fate it deserved. He had sued for damages for a certain breach of an alleged contract, and then desired to introduce evidence to show that an additional and unalleged breach had also been committed. The action of the trial court on both of the above mentioned points was clearly and unquestionably correct, and no labored argument is requisite to establish that proposition.

The judgment of the General Term is reversed and that of the Special Term is affirmed. Judge Wagner is absent; the other judges concur.



---

Lamb, Adm'r v. Helm, Adm'x.

---

**ALFRED W. LAMB, Adm'r pendente lite of JOHN B. HELM, Dec'd, Defendant in Error, vs. MARY A. HELM, Adm'x with the will annexed of, JOHN B. HELM, Dec'd, Plaintiff in Error.**

1. *Wills—Contests touching—Administrator—Functions suspended—Appointment of administrator, pendente lite—Construction of statute.*—Where proceedings are commenced in the Circuit Court under the statute (Wagn. Stat., 1363, § 29,) to contest the validity of a will, the Probate Court is authorized by virtue of § 13, of the Administration Act, (Wagn. Stat., p. 72,) to suspend the functions of the executor or administrator, and to appoint a temporary administrator *pendente lite*. The latter section was enacted mainly, if not solely, in view of proceedings authorized by the statute touching wills.  
This authority to suspend and supersede during the contest applies not merely to the case of an executor named in the will, but is broad enough to reach that of an administrator with the will annexed, who derives his power solely from appointment by the Probate Court.
2. *Executors—Powers derived chiefly from appointment.*—The power of an executor under our law to act as such is derived, not so much from the will of the testator as, from the appointment of the court and a compliance with the law.
3. *Administration—Section 13 of act—Words "other person"—Construction of.*—Section 13 of the Administration law (Wagn. Stat., p. 72,) provides that "if the validity of a will be contested or the executor be a minor or absent from the State, letters shall be granted during the time of such contest, minority or absence, to some other person." *Held*, that a proper construction of the words "other person" would seem to be that a person other than, or different from the one charged with the execution of the will—whether named in the will or not—shall be appointed to take charge of the estate during the contest.
4. *Wills—Probate of—Contest touching proceedings in Circuit Court—Onus probandi.*—When a contest is commenced in the Circuit Court under our statute concerning wills, either to establish a will which has been rejected by the Probate Court, or to contest the validity of a will which has been allowed and probated in the Probate Court, in either case the party who relies on, or asserts the validity of the will must prove it up in the same manner, and to the same extent, as if no action had been taken by the Probate Court.
5. *Wills—Contest over—Appointment of administrator pending—Wife has no priority under § 6 of Administration law—Const. statute.*—Section 6 of the administration law (Wagn. Stat., p. 72,) does not give preference to the wife over others to be selected under § 13 of same act, as special administrators pending contest over the will of the deceased husband. Section 6 refers to the appointment of general administrators, who are to administer and distribute the estate, and has no reference to special administrators appointed to preserve the estate under order of court.

*Error to Hannibal Court of Common Pleas.*

Geo. H. Shields, for Plaintiff in Error.

I. The powers of administrators *pendente lite* are simply those of a collector of the estate, while no authorized person to do so is existing. (Ellis vs. Deane, Beatty, pp. 5-12; Walker vs. Woollaston, 2 P. Wm's, 589; Wills vs. Rich, 2 Atkyn's, 284, 5; 1 Wil. Ex'rs., 311-13.)

II. Such administrator will not be appointed where there is a general administrator appointed and qualified to act. (Searls vs. Scott, 6 S. & M., 246-50; Boyd vs. Swing, Adm., 38 Miss., 182-196; Mortimer vs. Paull, 39 Law J., 47, Pro. Matters; Dayt. Surr., 234.)

III. Nor can he be appointed after probate of will. (Atkinson vs. Henshaw, 2 Ves. & Beames, 84, 91, 92; Ball vs. Oliver, 2 Ves. & Beames, 95, 96, 97; Knight vs. Duplessis, 1 Ves., 324; Griffith vs. Frazier, 8 Cranch. [S. C.], 9-19; 1 Lomax Ex'r. §, IV, 165.)

IV. Such administrator will not be appointed unless manifest necessity appear therefor. (Sutton vs. Smith, 1 Lee., 207-9; Maskeline vs. Harrison, 2 Lee., 258-9; Goodrich vs. Jones, 2 Curteis, 453, 454; Dayt. Surr., 231.)

V. An administrator *pendente lite* is never appointed for the purpose of putting a party in possession of an estate. (Nor they vs. Cock, 1 Adams, 326, 329.)

VI. The only limited administrations are those provided for in the statute. The statute is declaratory of the law as it existed before its passage. No power exists in the Probate Court, except the statutory power which is to be construed strictly. (Dayt. Surr., 231 232, 234.)

VII. The administrator does not derive his right or authority from the will, but from the appointment of the court. The executor derives his right to be qualified from the will. His letters are merely an authentication of that power. Hence, no reason exists why, in case of a contested will, an administrator should be substituted by an administrator *pendente lite*. (Will. Ex'rs, pt. 1, B. 4, 159 to p. [239]; Dayt. Surr., 195, 232, 233; Staggs vs. Green, 47 Mo., 500.)

VIII. If we construe the statute relied on by the plaintiffs by the light of these authorities, the words "if the validity of a will be contested," are limited to such contests as affect the right of executorship.

The section to be construed prescribes three classes of cases, only, in which the appointing power can be exercised. These classes show, that the question in the mind of the legislature was the executor's right to demand confirmation by the Probate Court of the inchoate authority conferred by the wife. Where this right is disputed, power is granted to substitute limited administrators for the executor. The reason for such appointment is the incapacity of the executor to act, his right being contested.

The construction of the words "some other person" evidently is, that those words mean some person other than the incapacitated or contested executor named in the will. The statute referred to is, in its nature, declaratory of the law as it existed before the statute was passed. (Geyer's Digest, p. 44; 1 Mo., Territorial Laws, 1822, p. 921; Gen. Statutes Mo., 1825, p. 94, § 6; Gen. Statutes Mo., 1835, p. 42, § 9; Gen. Statutes Mo., 1845, p. 64, Ch. 3, § 11; Gen. Statutes Mo., 1855, p. 115, Ch. 2, § 13; Gen. Statutes Mo., 1865, p. 481, Ch. 120 § 13; 1 Wagn. Stat. Mo., 1872, p. 72, Chap. 2, Art. 1, § 13.)

In the first of these laws, the power was given to appoint limited administrators during the "minority or absence of the executor," or in cases of "contested wills," to appoint a collector to collect and preserve the estate of the decedent until a probate of his will, or administration of his estate be granted.

In 1822, it provided for the appointment of an administrator with limited powers in all three classes of cases named, or "of some person, or persons to collect and preserve the estate." The power was given to the County Courts or "clerk in vacation" showing that the intention was to "collect and preserve the estate," and to have such appointment made, when necessary, before probate of will, but not afterwards. In 1825, the law of 1822 was substantially re-enacted. In 1835, the

section as it now stands was enacted at the revising session of the legislature, and was re-enacted without change in 1845, 1855, and 1865.

This section is identically the same in meaning, as the law of 1815,-22, and-25, though expressed more concisely. The same three classes of cases are referred to as in the previous laws.

The central idea of the enactment is, the collection and preservation of the estate still—the appointment of some person whose authority to administer continues till the “executor or regular administrator is qualified to act.” His authority is limited just as in the law of 1815, until the probate of his will, or administration of his estate be granted, because the limitation is to the time, until the “executor or regular administrator is qualified to act.”

This section of 1865, is explained and construed by the laws of 1815,-22 and-25, and the inevitable conclusion is, that it refers to contests prior to probate, and those involving the right to the executorship, and none other.

The statutes show that the power of appointing administrators *pendente lite*, only exists before probate, in contests involving the “validity of a will,” as affecting the right to be executor, because provision is made for the appointment of an administrator in all cases after probate. (1 Wagn. Stat., p. 72, § 10; p. 77, § 46.)

If necessary to appoint an administrator *pendente lite* the widow should have been appointed. “Letters of administration shall be granted, first, to the husband or wife; secondly, to those who are entitled to distribution, &c. (1 Wagn. Stat., 72, Chap. 2 § 6; 1 Williams on Exec., 288-9.) “After probate of will, letters testamentary shall be granted to the persons therein appointed executors. If all such persons refuse to act, or be disqualified, letters shall be granted to the person to whom administration would have been granted if there had been no will.” (1 Wagn. Stat., 72, Chap. 2, § 10.) “If all the executors or administrators of an estate die, &c., letters”  
\* \* \* “shall be granted to those, to whom administration

---

 Lamin, Adm'r v. Helm, Adm'r.
 

---

would have been granted if the original letters had not been obtained." \* \* \* &c. (1 Wagn. Stat., 77, Chap. 2, § 46.)

If these sections mean anything, they mean that the policy of the law is to grant administration in every case to the parties preferred under the law. The general letters of Mary A. Helm were rightly revoked. The case stood exactly as in the case named in the 10th section, where the "executors are disqualified," and she was entitled to letters *pendente lite*. Especially so, as the testator requests in his will that the administration of his estate do not pass out of his family. Unless the person entitled to preference in administration is within the cases enumerated in the statute (1 Wagn. Stat., p 75, § 35), he cannot be excluded from his right to administer. (Harrison vs. McMahon, 1 Bradf. [Surr.], 283; Coope vs. Loworre, 1 Barb. Chan., 45; Emerson vs. Bowers, 14 N. Y., 449; McMahon vs. Harrison, 10 Barb., 659; Mullanphy vs. County Court, 6 Mo., 563.) There cannot be two administrators at the same time on the same estate. (Post vs. Caulk, 3 Mo., 35; Griffith vs. Frazier, 8 Cranch., 9-19.)

The Probate Court having appointed a general administrator, could not revoke her letters, without cause being shown therefor, and this position is not controverted in the case of Rogers vs. Dively, 51 Mo., p. 193. That refers to executors alone.

*J. L. Robards & T. H. Bacon*, for Plaintiff in Error.

The Ecclesiastical Courts "refuse to grant administration pending suit merely to take property out of the hands of a litigant party in possession of it." (Northey vs. Cock, 1 Ad., 326; Sutton vs. Smith, 1 Ca. Temp. Lee, 207; Maskeline vs. Harrison, 2 Lee, 258; Goodrich vs. Jones, 2 Curteis Ecc., 453; Walker vs. Woolaston, 2 P. W., 576; 1 Williams' Ex'rs, 5 Am. Ed., 431; \* 433; Mortimer vs. Paull, 2 Law Reg. 85.) And our statutes nowhere permit a surrender of property by an administrator to an administrator *pendente lite*, (Wagn. Stat., p. 77, § 47,) or allow co-ordinate administrations on the same estate. (Post vs. Caulk, 3 Mo., 24, 25; Coltart vs. Allen, 40 Ala., 155; Haynes vs. Meeks, 20 Cal., 288;)

and nowhere provide for any suspension of letters of administration, or make the contest of the validity of a will a ground for revocation of such letters. (Wagn. Stat., 72, § 8; *Id.* 75, §§ 32, 33, 34, 35.) And therefore the grant of administration *pendente lite*, authorized by § 13, applies only to cases where no regular administration is in being. (Minnikhuysen vs. Magraw, 35 Md., 280; Matthews vs. Douthitt, 27 Ala., 273; Hyman vs. Gaskins, 5 Ired., 267; The Justices vs. Selman, 6 Ga., 402; Griffith vs. Frazier, 8 Cranch, 9.)

II. The administrator *cum testamento annexo* must prove the will of the deceased, (2 Sharsw. Blackst., 508, 1863;) and may prove in solemn form (1 Williams' Ex'rs, 5th Am., 299, side 301); and probate in common form is binding on the world until set aside or reversed. (Jourdan vs. Meier, 31 Mo., 40; Creasy vs. Alverson, 43 Mo., 13; Dilworth vs. Rice, 48 Mo., 124; Dickey vs. Malechi, 6 Mo., 182; Benoist vs. Murrin, 48 Mo., 48; Tapley vs. McPike, 50 Mo., 589; Byrn vs. Fleming, 3 Head., 658, 662.)

III. In the case of a probate in common form, where the will is admitted to probate and the codicils appointing executors are rejected and the widow of the testator is appointed administratrix with the will annexed, upon a contested suit propounding in solemn form said will and codicils, the widow during such contest is entitled to be treated as administratrix *pendente lite*. (Patton's Appeal, 31 Penn. St., 366.)

IV. No will can be a complete will unless it appoints an executor (2 Sharsw. Blackst., 504, 1863; 1 Tucker's Com., 388), and our statutes of administration refer only to wills that are complete (Wagn. Stat., 72 § 10), and when § 13 provides for grant of administration to "some other person," it means "some other person" than "the executor" (Rogers vs. Dively, 51 Mo., 193), and an administrator, with the will annexed, is not an executor. (Phillips vs. Hartley, 3 C. & P., *In re* Ward, 5 N. Y. Surrogate, 254.)

V. The "some other person" whom § 13 designates as entitled to letters of administration *pendente lite*, must come from the class prescribed by § 6 (Mitchell vs. Peoples,



---

Lamb, Adm'r v. Helm, Adm'r.

---

46 Mo., 203), and in this class the widow's right is paramount, and she is therefore primarily entitled to the grant of letters of administration *pendente lite*. (*In re Root*, 5 N. Y. Surrogate, 257; *Durham vs. Roberts*, 27 Ala., 701; *Chegaray vs. Mayor*, 13 N. Y., 220, 229; *Lynson vs. Stanbridge*, 2 H. & N., 51; *Sandiman vs. Beach*, 17 Barn. & Cress., 96; *City of St. Louis vs. Laughlin*, 49 Mo., 559, 564.)

VI. After a subscribing witness to a contested will has, on a contest of the will, testified against the soundness of mind of the testator, the appointment of such subscribing witness, administrator *pendente lite* of such testator's estate, is a gross abuse of the pretended power of the Probate Court. (*Withington vs. Withington*, 7 Mo., 589; *Murphy vs. Murphy*, 25 Mo., 326; *Cravens vs. Faulconer*, 28 Mo., 19; 1 *Powell on Wills*, 81; *Smith's Probate Law*, 22; *Rees Adm'r vs. Stille*, 38 Penn., *Scribner vs. Crane*, 2 Paige, 147; *Hindson vs. Kersey*, 4 Barnes' Eccl. Law, 85; 1 *Redfield on Wills*, 36, 37, 96, 97, 98, 667; *Supplement to Ves. Jr. Rep. Hovenden*, Vol. 2, p. 174; *Burrows vs. Locke*, 10 Ves., 470; *Brogdon vs. Brown*, 2 Adams, 441; *Walton vs. Shelley*, 1 T. R., 300; *Goodtitle vs. Clayton*, 4 Burr., 224; *Boatle vs. Blundell*, 10 Ves., 204; *Lowe vs. Joliffe*, 1 Blackst., 365; *King vs. Nueys & Galley*, 1 Wm. Blackst., 416; *Alsey Howard's Will*, 5 Mon., 199; *Tarrant vs. Ware*, 25 N. Y., 425; *Diggs' Case*, *Skinner*, p. 29; *Rice vs. Oatfield*, 2 Strange, 1096; *Delafield vs. Parish*, 23 N. Y., 9, 77.)

*W. C. Foreman and Harrison, Anderson & Boulware*,  
for Defendants in Error.

I. Section 13, Art. 1 Administration Law, embraces proceedings instituted under authority of § 29 of the act relating to Wills. (*Rogers vs. Dively*, Adm'r, 51 Mo., 193.)

II. Section 13 is mandatory.

III. In a proceeding instituted under § 29 of the Statute of Wills, the burden of establishing every fact essential to make the proper writing a valid testamentary instrument, rests upon the propounder of the instrument. (*Benoist vs. Murin*,

48 Mo., 48; Tingley, vs. Cowgill, 48 Mo., 292; Williams vs. Robinson, 42 Verm., 638; *In re* Fisher, 15 Wis., 511; Rogers, vs. Dively, above cited; Redf. Wills, 227.)

The cause proceeds in the Circuit Court as though no action had been had by the Probate Court. The propounder again presents the instrument and asks the court by its judgment to establish it as the last will of the deceased, and the Circuit Court adjudges it to be, or not to be, such will. (See the authorities above cited, especially Williams vs. Robinson.)

IV. There is no right of priority in granting letters of administration *pendente lite*. The right as conferred by § 6, Art. 1, of Administration Law relates to general administration only. Temporary limited administration has been frequently held in England not to be within the similar statute of 21 Henry, 8, Ch. 5, § 3. It is discretionary to grant such administration to such person as the court may see fit. (Williams' Exc., 1, 395, 396, and cases cited in note X; also page 410, 411.)

VORIES, Judge, delivered the opinion of the court.

On the 10th day of June, 1872, an instrument was presented, purporting to be the last will and testament of John B. Helm, then deceased, in the Hannibal Probate Court, to be proved and probate thereon granted.

The instrument consisted of an original instrument executed in the year 1867, and eight supplemental instruments or codicils, executed at different times within the two years next preceding the death of Helm.

The codicils materially modified and changed the disposition of the property as made by the original will. The Probate Court admitted to probate the original instrument as the last will of Helm, and rejected the eight other instruments purporting to be codicils. The Probate Court then appointed Mary A. Helm, the widow, administratrix of the estate, with the will annexed as it had been admitted to probate, the executor named in the will being dead, and issued her letters of administration accordingly, after which she qualified as such.

---

Lamb, Adm'r v. Helm, Adm'r.

---

Immediately after this, the administratrix, so appointed, in connection with others interested in the estate, filed her petition in the Hannibal Court of Common Pleas, under the provisions of section 29 of the statute concerning Wills (General Statute, 530), praying to have the instrument as originally presented in the Probate Court proved and allowed.

All parties in interest were made parties to this proceeding; part of them were personally summoned to appear, and others were notified by publication.

Those personally served appeared and answered, denying that the instrument offered to be proved was the last will and testament of the deceased.

After the commencement of the proceedings of Mrs. Helm and others, in the common pleas court, Joseph J. Johnson and others, parties interested in the estate, made their motion in the Probate Court, asking that the letters with the will annexed, before granted to Mrs. Helm, be revoked and that an administrator be appointed during the contest concerning the will in the common pleas court. This motion was sustained and the court made an order in terms revoking the letters previously granted to Mrs. Helm, and granted letters of administration, during the continuance of the contest, to Alfred W. Lamb. Mrs. Helm at the time objected to these orders made by the Probate Court, and her objections being overruled, she excepted. The widow, Mrs. Helm, then made her motion in the Probate Court, to set aside the order appointing Lamb administrator, pending the contest of the will, and to grant administration, *pendente lite*, to her. This motion was overruled by the court.

From this action of the court of common pleas, the widow has sued out her writ of error, and has brought the case to this court.

The controversy in this case, as has been seen, grows out of an attempt on the part of Joseph J. Johnson and others, made in the the Hannibal Probate Court, to have the letters of administration with the will annexed, previously granted to Mrs. Helm on the estate of her husband, John B. Helm,

---

Lamb, Adm'r v. Helm, Adm'x.

---

deceased, revoked, and another person appointed as administrator, during a contest in reference to the validity of the will, then pending in the Hannibal court of common pleas, under the provisions of the 29th section of the statute of this State, concerning wills.

The Probate Court revoked the letters of administration, with the will annexed, previously granted to Mrs. Helm, and appointed Alfred W. Lamb administrator, during the pendency of the contest, and afterwards refused to revoke the same and appoint Mrs. Helm, the widow, as administratrix during said contest, upon a motion filed by her for that purpose. From these orders of the Probate Court, the widow appealed to the Hannibal court of common pleas, where the order of the Probate Court, in granting the letters to Lamb, during the litigation or contest, and refusing such letters to the widow was affirmed, but the order revoking the letters previously granted to the widow with the will annexed, was reversed, and in lieu thereof, an order was made by the common pleas court, merely suspending her letters during the contest.

It is insisted here, that the court of common pleas erred in affirming the letters granted to Lamb, and in affirming the action of the Probate Court in refusing to grant said letters to the widow; that the Probate Court had no authority to appoint an administrator, *pendente lite*, where a will had been probated, and an administratrix appointed with the will annexed; that the authority to appoint an administrator during the time of the contest of a will, provided for in the 13th section of the first article of the act respecting executors and administrators, (Wagn. Stat., p. 72) is not applicable to contests under the 29th section of the statute concerning Wills, but only applies to contests in the Probate Court, before there is any probate of the will or any letters granted. And it is further insisted, that if such an appointment could be made during such a contest, that the widow is first entitled to the appointment, under the preference given her under the 6th section of the first article of the act respecting Executors and Administrators, (Wagn. Stat., p. 72).

---

Lamb, Adm'r v. Helm, Adm'r.

---

The first question presented for consideration in this case, was fully presented and discussed in the case of *Rogers vs. Dively*, administrator, (51 Mo., 193). In that case, as in this, the will had been admitted to probate by the court having probate jurisdiction, and letters testamentary had been granted to the executrix named in the will; and in that case, as in this, after the probate of the will in the Probate Court, and the grant of letters testamentary, a proceeding was commenced in the proper court, under the 29th section of the statute concerning Wills, to contest the will, after which a motion was made in the Probate Court to revoke the letters testamentary, before granted to the executrix of the will, and to suspend her authority as such executrix, and asking for the appointment of an administrator, *pendente lite*. The Probate Court sustained the motion, suspended the letters testamentary before granted, and appointed Dively administrator, during the time of the contest of the will. The executrix appealed to the Circuit Court, where the action of the Probate Court was sustained, and the case brought to this court, where the judgment of the Circuit Court was affirmed, this court holding, that the 13th section of the act before referred to, was enacted mainly, if not solely, in view of the proceedings which are authorized by the statute concerning Wills. Therefore, that question need not be further noticed.

It is insisted, however, that there is a distinction to be taken between the present case and the case of *Rogers vs. Dively* in this, that in that case the executrix in the will had been appointed and qualified to act by the Probate Court, and that she was acting not merely by the authority she received from her letters testamentary, but that her powers were mainly derived from her appointment in the will, and that therefore while the will was in contest, her powers might properly be suspended, while, in the present case, Mrs. Helm was acting by virtue only of the power derived from her appointment by the Probate Court, and that she would still be qualified to act as administratrix of the estate, with the will annexed, notwithstanding the contest of the will, and that wherever there

is an administrator, qualified to act, already appointed, no administrator, *pendente lite*, can be appointed. I do not think that this distinction has much force. It is, to my mind more apparent than real. Executors in this State do not receive their authority to act, from the will alone, but they, as well as administrators, have to give bond and file the affidavit required by law, before they are fully installed in office. The executor does not, under our laws, become the legal owner of the personality of the deceased, by virtue of his nomination in the will, he must be regularly qualified and commissioned, under our statute, before he becomes fully authorized to act as executor.

The will points out the person to act, but his authority to act is mainly derived from his appointment.

The law points out the husband or widow of the deceased as the first entitled to administer, but their right to do so, and their power to act, still depend on the action of the Probate Court, and the 11th section of the administration act. Where there are two or more persons appointed co-executors in a will, the law expressly forbids any from acting or intermeddling with the estate except those who have given bond, (Stagg vs. Green, 47 Mo., 500).

It will be seen, therefore, that the power of an executor, under our law, to act as such, is derived not so much from the will of the testator, as from the appointment of the court, and a compliance with the law. By the 13th section of the administration law before referred to, it is provided that, "if the validity of a will be contested, or the executor be a minor, or absent from the State, letters of administration shall be granted, during the time of such contest, minority or absence, to some other person, who shall take charge of the property, and administer the same according to law, under the direction of the court, and account for, pay and deliver all the money and property of the estate to the executor or regular administrator, when qualified to act." It is insisted that the words "other person," as used in the foregoing section, mean a person different from the executor named in the will, and



the administratrix, with the will annexed, is another person within the meaning of the law, and that, therefore, there was no power vested in the court to appoint another administrator to act during the contest of the will.

It may be that by a technical construction of the section, the words, "other persons," would mean some person different from the one named as executor in the will, but the most rational and practical construction of the language used by the legislature, would seem to be that a person other or different from the one charged with the execution of the will, shall be appointed to take charge of the estate during the contest.

When a contest is commenced under our statute concerning Wills, either to establish a will which has been rejected by the Probate Court, or to contest the validity of a will which has been allowed and probated in the Probate Court, the effect is the same as if an appeal had been taken from the action of the Probate Court to the Circuit Court, where the question could be tried anew, just as if no action had ever been taken in the Probate Court. The party who relies on or asserts the validity of the will, must prove it up in the same manner and to the same extent as if no action had been taken by the Probate Court; in fact, the action of the Probate Court becomes wholly void by such contest, so far as the efficacy of the will is concerned. The effect of the contestant's petition and the proceedings thereunder, was to transfer the whole matter to the Court where the proceedings are pending. (*Benoist vs. Murrin*, 48 Mo., 48; *Tingley vs. Cowgill*, 48 Mo., 291; *Williams vs. Robinson*, 42 Verm., 658; 15 Wis., 511.)

In such case, the will being of no force or effect until it is proved and allowed in the court where the contest is pending, it would be wholly inconsistent with the rights of the parties for the executor to proceed to administer the estate, and carry out the provisions of a will while it was being contested, and might never be established; and I am unable to see the difference between the rights and powers of an executor and an administrator with the will annexed, in such case.

If the executor proceeds, he proceeds to carry out the provisions of a will that has not been proved or probated. If the administrator with the will annexed, proceeds, he must necessarily carry out the provisions of the will, and in the case now being considered, the executrix would be administering and carrying out the provisions of the will as probated in the Probate Court, while she, at the same time, is insisting in the common pleas court, that the will, as probated, is not the will of the deceased, but that it with eight codicils, constitutes the true will. This would be wholly inconsistent; and hence, another person should be appointed to take charge of the estate under the orders of the Probate Court, until it is determined whether there be a will or not, and what the will is.

But it is further contended, that if the Probate Court had the right to appoint an administrator to act during the contest, the widow was entitled to be preferred, and had a right to be appointed under the 6th section of the administration law, (Wagn. Stat., 72). That section reads as follows: "Letters of administration shall be granted, first, to the husband or wife, and secondly, to those who are entitled to distribution of the estate, or one or more of them, as the court or clerk in vacation shall believe will best manage and preserve the estate."

This section refers to the appointment of general administrators, who are to administer and distribute the estate, and has no reference to special administrators to preserve the estate, under the order of the court, as provided for in the 13th section before referred to. Such special administrators occupy more nearly the position of a receiver, who acts under the directions of the court, than they do the position of a general administrator, and it is believed that such appointments were not contemplated by, or included in, the provisions of the 6th section above referred to. This disposes of the main points made in this case. There were some minor points made, but it is believed that they are either included in, or governed

---

 Rice et al. v. Groffmann.
 

---

by, the points already noticed, or are not material to a proper disposition of the case.

Judgment affirmed. Judge Napton, having been of counsel in the case, did not sit; the other judges concur.

---

 o
 

---

**T. R. RICE, et al., Respondents, vs. CHARLES GROFFMANN, Appellant.**

1. *Agent—Powers—Sale and payments.*—A power to sell goods includes a power to receive payment.
2. *Agency—Authority—Mistake, party causing should suffer consequent loss.*—Where a party has so acted, that another is led to believe in the right of a third person to act as his agent, if any loss occurs by reason of any act of the supposed agent, the loss must fall on him whose conduct caused the mistake.

*Appeal from St. Louis Circuit Court.*

*Gottschalk*, for Appellant.

I. The instruction given on the part of respondent is erroneous; (a.) in leaving out of view the question, whether the plaintiffs were, or were not, estopped from denying the right of Berlzheimer to collect the money, by permitting the defendant to rest under the impression that he could safely pay Berlzheimer. This works an estoppel upon plaintiffs, and they cannot now allege that Berlzheimer had no right to receive said money as against defendant. Silence, when a person should speak, estops. (*Skinner vs. Stouse*, 4 Mo., 93; *Rice vs. Bunce*, 49 Mo., 231; *Chouteau vs. Goddin*, 39 Mo. 229; *Newman vs. Hook*, 37 Mo., 207; *Parsons on Contracts*, Vol. II, p. 793.) (b.) In confining the jury to the question, what authority plaintiffs had given to Berlzheimer. This is not the true criterion, but the question should have been, what authority defendant had a right to believe, from the acts of plaintiffs, that Berlzheimer possessed; for where third parties are concerned, an agent is constituted, not by the authority actually received from his principal, but by that which the

latter allows the agent to assume. (Budenberker vs. Lowell, 32 Barb., 18; Johnson vs. Jones, 4 Barb., 369; 1 Pars. Cont., 39, 40.)

II. The instructions for defendant should have been given. Berlzheimer sold the cigars on credit, and plaintiffs ratified his action; they delivered the cigars to him and he delivered them to defendants. "A party who sells goods has, *prima facie*, the right to receive payment for them" and a party who is intrusted with the possession of goods to sell them is also entitled to receive payment. (Story on Agency, § 102; Johnson vs. McGruder, 15 Mo., 365; Sumner vs. Saunders, 51 Mo., 89; Capel vs. Thornton, 3 Carr. & Payne, 352; Lumley vs. Corbett, 18 Cal., 494.)

Payment to an agent in the ordinary course of business binds the principal, unless the latter has notified the debtor beforehand, that he requires payment to be made to himself. (Pars. on Contr., Vol. 2, p. 614; Sumner vs. Saunders, 51 Mo., 89)

Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third party to occasion such loss must sustain it. (1 Pars. Cont., p. 38, Ch. 111; Hook vs. Drake, 49 Barb., 186.)

*Leverett Bell*, for Respondents.

NAPTON, Judge, delivered the opinion of the court.

This was a suit originating in a justice's court to recover \$27.50 for 500 cigars sold to defendant. It seems that the defendant bought the cigars from one Berlzheimer, who came into his saloon, and upon his assuring the defendant that he had some good cigars, such as the defendant had bought from him before, defendant finally agreed to take five hundred at forty-five dollars a thousand, if they proved to be like those he had formerly bought, and he (Berlzheimer) would wait upon defendant thirty days. The next day Berlzheimer brought the cigars and delivered them to defendant, and a bill of them, made out in the name of plaintiffs. In the course of a few weeks defendant paid Berlzheimer for the cigars and took his receipt.

One of the plaintiffs testified, that Berlzheimer was not their agent, and never had been; that he had no authority to sell cigars for them, and none to receive the payment. This evidence was objected to by defendant. The court instructed the jury, that though defendant paid Berlzheimer for the cigars, yet this was no payment to plaintiffs unless the jury believe from the evidence that said Berlzheimer was authorized by plaintiffs to collect said money for them; and if they believe from the evidence that said Berlzheimer was not authorized by plaintiffs to make said collection, the jury will find for the plaintiffs \$27.50 with interest, etc.)

The defendant asked several instructions, all of which were refused. By these instructions the court was asked to declare the law to be, that if Berlzheimer was the agent for plaintiffs in selling the cigars, the payment to him was good, unless defendant was notified not to pay him, and if he sold the cigars in question on a commission, then he was their agent for that purpose.

As the court allowed the witness, one of the plaintiffs, to state that Berlzheimer was not their agent for any purpose, the verdict was, of course, for plaintiffs under the instructions. It is very clear that Berlzheimer was intrusted by plaintiffs with some control over the package of cigars which he received from plaintiffs, and which he sold to defendant, and personally delivered to them. He was, in fact, the only person known to defendant in the transaction, unless the bill handed him by the clerk, might be regarded as advising him that the cigars belonged to plaintiffs. This, however, could lead to no question as to the extent of Berlzheimer's authority.

A power to sell goods includes a power to receive payment. This was so declared by Lord Tenterden in *Capel vs. Thornton*, 3 Car. & Payne, 352, and Judge Story adopts the principle in his work on Agency, (§ 102). The case of *Lumley vs. Corbett*, 18 Cal., 494, and the cases decided by this court, (*Sumner vs. Saunders*, 51 Mo., 89, and *Brooks vs. Jamison*, 55 Mo., 505,) maintain this doctrine. And upon an-

---

Sheble v. Curdt.

---

other ground, the plaintiffs had no right of action. When one of two innocent parties must suffer by a third, he who has enabled such third party to occasion such loss ought to sustain it. Whatever the plaintiffs may say as to the agency of Berlzheimer, it is clear that he negotiated and effected the sale to defendant; that he had the cigars and delivered them, and there was nothing to show he was not their owner except the bill; and conceding he was not, the presumption was, that as he had authority to sell, he had authority to receive payment. There was no evidence to justify the instructions for plaintiffs. The instructions asked by defendant should have been given.

The judgment is reversed and the cause remanded. The other judges concur, except Judge Wagner who is absent.

—o—

GEORGE W. SHEBLE, Appellant, *vs.* HENRY FREDERICK CHARLES CURDT, Respondent.

1. *Landlord and tenant—Crops—Pledge of as security for rent—Rights of landlord—Replevin.*—An agreement of lease of a farm contained a provision that in order to secure the rent reserved, the lessee conveyed and sold to the landlord all of a certain crop then growing on the land, with the power, in case of non-payment of the rent when due, to take possession of the crop and apply the proceeds *pro tanto* to the payment of his rent. *Held*, that the landlord had no right to the immediate possession of the crop; his right to possession depended upon the lessee's failure to pay rent, therefore before that contingency occurred the landlord had no right to replevy the crops.

*Appeal from St. Louis Circuit Court.*

*Bakewell, Farish & Mead*, for Appellant.

I. There was an actual sale of this growing crop, perfectly good between the parties thereto. The attempt of the defendant to remove the crop, for the purposes of selling the same and pocketing the proceeds, was a tortious conversion which entitled the plaintiff, the vendee, to immediate possession. (*Loeschmann vs. Machin*, 2 Stark., 211.)



II. To comply with the statute it was only necessary that the plaintiff should have the right of immediate possession, and that the property should be found in possession of another. (*Pilkington vs. Trigg*, 28 Mo., 95; *Gen. Stat.* 1865, 663.)

III. An action for claim and delivery of property severed from the freehold, while in adverse possession of defendant, whether as a trespasser, or under title may be maintained. (*Kendall vs. Lohmans*, 31 Cal., 155; *Davis vs. Camp*, 1 Price, 53.)

IV. By the severance from the freehold, the wheat became the personal property of the owner of the land, the lessor, and on the attempt to remove it, trover would lie. (*Watson vs. Hunter*, 5 Johns. Ch., 169.)

*Jecko & Hospes*, for Respondent.

I. The lease did not purport to convey an absolute title or right of possession to the wheat. It is nothing more than a provision in the lease for a more summary mode of enforcing the lien which the appellant had under the statute. (2 Wagn. Stat., [1870,] 880, § 18.) The lien of the landlord can only be enforced by process of law. (*Knox vs. Hunt*, 18 Mo., 243; see also *Burgess vs. Kattlemann*, 41 Mo., 480.)

II. If the attempted removal of the crop of wheat by the respondent endangered the rent to become due, section 26, Chap. 85, of 2 Wagn. Stat., 1870, p. 881, gave appellant a complete remedy and protection. The appellant never demanded the rent, nor the possession of the wheat; both were necessary to enable him to maintain this action, if it could be maintained at all.

III. In any view of the case he could not sell the wheat till default in the payment of the rent.

SHERWOOD, Judge, delivered the opinion of the court.

On the 29th day of November, 1870, the plaintiff, Sheble, leased to defendant, Curdt, his farm in St. Louis county, until the 1st day of March, 1872, at a rent of \$475, payable on the 1st day of September, 1871. Among other clauses in the

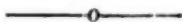
lease, which was signed by both lessor and lessee, was one couched in these words: "And for the purpose of securing the payment of said sum, hereinbefore reserved as rent for the said premises, said party of the second part hereby sells, transfers and sets over to said party of the first part, all of the crops of wheat now growing on said devised premises; hereby giving to said party of the first part full power and authority, in case of failure on his part to pay said rent when the same becomes due as hereinbefore provided, to take possession of said crops and sell the same at the best price he can obtain therefor, and out of the net proceeds thereof, to pay said rents hereinbefore reserved, and the balance, if any, he shall pay to said party of the second part."

In July, 1871, defendant had commenced removing the wheat, which had been harvested and placed in sacks, from the demised premises, and thereupon the plaintiff, on the 18th of that month, sued out his writ in the present action, took possession thereunder of said wheat, had the same brought to St. Louis on the 30th day of August, and sold on the 1st day of September, the day the rent fell due. On the same day also, on which the sale took place, defendant paid the rent which was accepted and receipted for by the plaintiff, who afterwards paid the net proceeds of the wheat into court, being \$446.85. There would seem to be but little doubt from the testimony, that it was the intention of the defendant to sell the wheat and apply the proceeds to other purposes than the payment of the rent. The court upon this state of facts gave judgment for the plaintiff, for one cent damages and costs, &c.

Under the terms of the lease the plaintiff was not entitled to the immediate possession of the wheat. His right to such possession had not accrued but depended entirely upon the happening of a certain contingency, viz: the non-payment of the rent at the time it should become due. This is sufficient to show that he could not, prior to the occurrence of such event, have any ground whereon to maintain replevin or its statutory substitute for the recovery of the property in

question. The law gives the landlord a lien on the crop for the rent, and the only effect of the clause in the lease above referred to, was to confer authority on the plaintiff when the rent fell due and remained unpaid, to take possession of the wheat, sell the same and apply a sufficiency of the proceeds to the purpose for which he was authorized to take such possession. The instances are numerous, where liens exist totally disconnected with any power of becoming possessed of the property on which they constitute incumbrances. (Knox vs. Hunt, 18 Mo., 243.) If the plaintiff had well founded apprehensions that defendant intended removing the property from the devised premises, he had a two-fold remedy within easy reach. Resort could have been had to injunction, or to that measure of redress which section 26, (p. 881, 2 Wagn. Stat.,) of the Landlord and Tenant Act affords.

For these reasons the judgment of the General Term reversing that of the trial court must be affirmed. Judge Wagner absent; the other judges concur.



DAN'L C. DEJARNETTE, *et al.*, Defendants in Error, *vs.*  
 ARMAND FRANCOIS ROBERT COMPTE DEGIVERVILLE, and  
 MARY VIRGINIA KINGSBURY, his wife, *et al.*, Plaintiffs in  
 Error.

1. *Bill in equity to set aside sale of land made during rebellion for non-payment of note.*—During the late rebellion, citizens residing in the rebel states were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Thus, where, after the President's proclamation of August, 1861, a note having been dishonored, certain land given under deed of trust to secure it was sold to satisfy the debt, a bill in equity will not lie on behalf of the maker to set aside the sale, on the ground that the plaintiff was, when the note matured and the land was sold, within the Confederate lines and cut off from all intercourse with the loyal States: it further appearing, that the plaintiff had voluntarily gone and remained South. The doctrine of *Dean vs. Nelson*, (10 Wall., 158,) has no application to such a case.

*Held* further, that the trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the maker of the note.

---

DeJarnette, et al. v. DeGiverville, et al.

---

Failure of notice to him, or even his previous death, would not invalidate the sale. The notice required by statute was not intended to apprise the grantor in the deed, of the sale of the land.

PER NAPTON, J., DISSENTING.

2. *Note—Deed of trust—Sale under during war—Equity will interpose.*—During the late war, the citizens of the rebel States being alien enemies were subject to the laws of nations, under which one residing in the South would be prohibited from paying a note which fell due in the loyal States during that period. Hence, default in its payment under such circumstances would not authorize the sale of land given under deed of trust to secure it, and equity would interpose to set aside the sale.

The note and deed of trust must be construed as made subject to the implied power of the governments to which the parties belong, to interfere with or suspend it "*flagrante bello*."

*Appeal from St. Louis Circuit Court.*

*Thos. T. Gantt*, for Plaintiff in Error relied upon *Washington University vs. Finch*, Cent. Law Journ., No. 6, 1874.

*Trusten Polk*, for Defendants in Error.

I. The last of the notes fell due while the war was raging and could not have been paid; and under that state of facts, the law would not allow it to be paid or the holders to receive payment. There was, therefore, no default on the part of the plaintiffs.

It follows, that there was not the presence of the condition upon which the trustee had assumed the obligation to sell the land, and of course he could make no valid sale. The making of the sale was a violation of his duty. Such inability to pay did not exist in the case of *Dean vs. Nelson*.

In consequence of the war, the plaintiffs being restrained and cut off from all communication with the defendants and the State of Missouri, it was not only a legal, but a physical, impossibility for them to pay the note.

*J. E. Drake*, for Defendants in Error.

The late war was a public war, not only between the governments, but between their individual citizens, and hence all commercial or business intercourse between persons domiciled in those sections was unlawful. (*The Venice*, 2 Wall., 258;

---

DeJarnette, et al. v. DeGiverville, et al.

---

Mrs. Alexander's Cotton, *Id.*, 404; Mauran vs. Ins. Co., 6 Wall., 1, and cases therein cited; Ouchita Cotton, *Id.*, 521; Hanger vs. Abbott, *Id.*, 532; Coppell vs. Hall, 7 Wall., 542; McKee vs. U. S., 8 Wall., 163; U. S. vs. Grossmayer, 9 Wall, 72; Bigler vs. Waller, 3 Am. Law Times, 157; McKee vs. Watson, 6 Am. Law Reg. [N. S.], 220; Jackson Ins. Co. vs. Stewart, 6 Am. Law Reg. [N. S.], 732; Cuyler vs. Ferrill, 8 *Id.*, 100; Semmes vs. City Fire Ins. Co., 8 *Id.*, 673; Kanawha Coal Co. vs. Kanawha & Ohio Coal Co., C. C., U. S., South. Dist. of N. Y., June 24, 1870, and cases cited; Dean vs. Nelson, 10 Wall., 158.)

I. From the nature of the case, plaintiff could have no valid notice. A notice to the mortgagor by publication in a newspaper was not legal, and, in a case like the present, proceedings founded thereon were wholly void. *A fortiori*, this is true in case of a deed of trust, being extra-judicial.

II. It appears from the agreed statement, that the plaintiffs for a long time prior to, during and subsequent to the publishing of said notice, &c., and during the continuance of the late war, were citizens and residents of Virginia, and under the control of the Southern Confederacy.

Even granting that they voluntarily placed themselves in this condition, and went within the Confederate lines, their *status* in this court is not changed or impaired thereby. The court will not enquire into the personal character or dispositions of the parties herein. (Mrs. Alexander's Cotton, 2 Wall., 404; Com. Ins. Co. vs. Hall, 7 Am. Law Reg., [N. S.] 606; Dean vs. Nelson, 10 Wall., 158.)

As to whether the petition makes a case for equitable relief, the facts there stated speak for themselves. Plaintiffs come into the court with clean hands, having made every offer and used all diligence that could be required of them; and surely a case of such hardship, wrong and injustice rarely occurs in the annals of the law. The case of the Kanawha Coal Co vs. The Kanawha & Ohio Coal Company is unanswerable authority in the case at bar.

WAGNER, Judge, delivered the opinion of the court.

In this case, the petition sets out a purchase by the plaintiffs from the defendants, in the year 1857, of certain real estate in the city of St. Louis, and the giving of notes for the consideration, secured by deed of trust, payable in one, two, three and four years, the last becoming payable on the 30th of April, 1861; a failure to pay the last note, and a sale by the trustee in consequence on the 9th of June, 1861, after publication of notice as required by the deed of trust. It was alleged, that all the notes were paid except that which matured on the 30th of April, 1861, and that the plaintiffs were ready and willing to pay this also, but were prevented by a state of war existing at that time, between the United States of America, of which Missouri was a part, and the Confederate States, of which Virginia was a part; and that the plaintiffs were, in 1857 and in 1861, and during the whole of the war which followed, citizens and residents of the county of Caroline, Va. By reason of the war existing, it was alleged, the notice and sale under the deed of trust were fraudulent and void. It was averred, that as soon as peace was restored, the plaintiffs tendered to the purchaser of the land the amount due under the deed of trust, which was refused, and they prayed that the deed made by the trustees under the sale of June 9, 1861 be set aside and annulled. To this petition the defendants demurred, assigning for causes of demurrer, that the petition showed no cause of action; that it appeared that at the time the default was made there was no suspension of intercourse between the citizens of Virginia and those of Missouri, and that even when the sale was made under the deed of trust, there was no such suspension, and that there was no excuse for the non-payment of the note of the plaintiffs. The court below overruled the demurrer and gave judgment for the plaintiffs, and the case is brought up for review on writ of error.

Whether there was any real or actual suspension of the relations theretofore existing prior to the act of Congress of July 12, 1861, empowering the President to prohibit, by pro-



clamation, all commercial intercourse between the rebellious and the loyal States, and the proclamation of the President in pursuance thereof, issued August 16, 1861, I will not stop to inquire. The case has been argued here upon the theory that, at the time the sale took place, Virginia had passed her ordinance of secession, and was out of the Union, and was among the number waging war against the general government. If so, her citizens were entitled to belligerent rights, and were clothed with all the characteristics of alien enemies.

Since the decisions in the Supreme Court of the United States in the cases of the *Venice*, (2 Wall., 258;) *Mrs. Alexander's Cotton*, (2 Wall., 404;) *Mauran vs. Insurance Company*, (6 Wall., 1;) *Ouachita cotton*, (6 Wall., 521;) *Hanger vs. Abbott*, (6 Wall., 532;) *Coppell vs. Hall*, (7 Wall., 542;) *McKee vs. United States*, (8 Wall., 163;) *United States vs. Grossmayer*, (9 Wall., 72;) the question must be regarded as settled, that the late war between the Confederate States and the United States was a public war; and a war, not only between the respective governments, but between all the inhabitants of the one territory, on the one side, and all the inhabitants of the other territory on the other side, so that all the people of each occupied the respective positions of enemies during the continuance of the war.

The consequence of a state of war is the interruption and interdiction of all commercial intercourse, correspondence and dealing between the subjects of the hostile countries. Kent says the interdiction flows necessarily from the principle that a state of war puts all the members of the two nations, respectively, in hostility to each other, and to suffer individuals to carry on a friendly and commercial intercourse while the two governments were at war, would be placing the act of government, and the acts of individuals in contradiction to each other. (1 Kent's Com. 66.)

As a corollary of this doctrine the principle is well established that an alien enemy cannot sue a friendly citizen in the courts of the latter's country. (*Bac. Abr. Alien, D.*; *Alcinous vs. Nigren*, 4 El. and Bl., 217; *DeWahl vs. Braune*, 1

H. & N., 178; *Whelan vs. Cook*, 29 Md., 1; U. S. vs. 1756 Shares of Stock, 5 Blatch, 231.) His disability is temporary in its nature, and personal, and founded upon reason and policy, and in a great measure upon necessity. But no such reason or policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and the rule is therefore settled that while an alien enemy may not sue, he may be sued at law.

The question has frequently been brought up in our courts in regard to matters arising out of the late rebellion, and the adjudications in the courts of last resort have all been in accordance with the principles above announced.

In *Mixer vs. Sibley*, (53 Ill., 61,) it was decided that when a party residing in the State of Illinois, holding a promissory note against a person residing in one of the States in rebellion, in the year 1862, after the act of Congress, and the President's proclamation prohibiting commercial intercourse between the adhering States and those in rebellion, commenced a suit thereon by attachment, which was levied on real estate situated in that State belonging to the maker, and obtained a judgment, and procured a sale to be made of the premises attached, that the court had jurisdiction of the cause, and the judgment and proceedings thereunder were valid and binding, notwithstanding the defendant resided in one of the rebellious States, and the war at the time was in active progress.

In the case of *Dorsey vs. Kyle*, (30 Md., 512,) the court holds that a person who, by his own votuntary act, assumed the attitude of an alien enemy to his State, and to the government of the United States, going from Maryland to Virginia during the late civil war, allying himself with the southern cause and joining the confederate army, cannot claim exemption from process of attachment in behalf of antecedent creditors against his property remaining in the State, on the ground that he was an alien enemy, and that all legal remedies were suspended during the period of hostilities. It is emphatically declared that neither reason nor policy forbids judicial proceedings against an alien enemy in favor of a

---

DeJarnett, et al. v. DeGiverville, et al.

---

friendly citizen, and therefore while an alien enemy may not sue he may be sued at law. The same question again arose in *Dorsey vs. Dorsey*, Id., 522, and the same principle was again asserted and re-affirmed.

The same conclusion was arrived at in the case of *Thomas vs. Mahone*, in the court of appeals of Kentucky, (12 Am. Law Reg., N. S., 433.) There the civil code of Kentucky authorized the creditors of a citizen who departed from the county of his residence and remained absent thirty days within the confederate lines, to attach his property and sell the same for the payment of their debts. The plaintiff left his home and joined the confederate service, and while so absent attachments were procured and his property sold, and the court held that the fact that the debtor was a soldier in the confederate army would not deprive the court of jurisdiction under the code. Lindsay, J., in delivering the opinion of the court, pointedly remarks: "It does not follow, because appellant was at the time a soldier in the army of the belligerent power, and that all unlicensed communication with him by the people of the States adhering to the federal Union was inhibited, not only by the laws of war, but by express statute, that resident creditors might not sue him in the courts of this State, and subject to the judgment of their debts such of his property as might be found within the local jurisdiction of the courts in which he was sued. The right of resident creditors so to proceed against parties indebted to them, residing within the lines of the hostile power, and held to be public enemies by reason of their participation in the southern movement, was recognized by the federal congress in the act of March 3, 1863, (2 Brightley's Digest 1238,) providing for the seizure and confiscation of the property of such persons."

In *Crutcher vs. Hord and wife*, (4 Bush., 363,) the same court held that a proceeding by a Kentucky creditor to enforce his lien on land situated in that State was not interdicted, notwithstanding the existence of the war and the residence of the debtors within the confederate lines. The Su-

preme Court of the United States in the case of *McVeigh vs. the United States*, (11 Wall., 259 :) after citing *Albretcht vs. Sussmann*, (2 Ves. and Bea., 324 ; *Bacon's Abridgment* and *Story's Equity Pl.*, § 53,) for authority says: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued."

It is contended that the case of *Dean vs. Nelson*, (10 Wall., 158,) asserts a contrary doctrine. That case was a proceeding within an insurrectionary district, but held by the national military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence, and who were forbidden absolutely by the order which expelled them from coming back again within the lines of the military authority which organized the court. They were not voluntarily within the confederate lines, but were sent there against their will, and inasmuch as without their consent and against their will they were thus driven from their homes and forbidden to return by the arbitrary act of the military power, it was held that a judicial decree by which their property was sold during the continuance in force of this order was void as to them.

But in the subsequent case of *Ludlow vs. Ramsey*, (11 Wall., 581,) it was adjudged that the doctrine of *Dean vs. Nelson*, that a judicial proceeding on a mortgage carried on within the Union lines against a person driven, by way of retaliation for outrages committed by others, outside of those lines, and prohibited from returning within them, did not apply to a person who went and remained voluntarily in rebellion. Such a person could not complain of legal proceedings regularly prosecuted against him as an absentee.

But there is another aspect in which this case must be considered, and which really presents the principal point, and upon which I would have been satisfied to have placed it had not the counsel for the defendants in error, plaintiffs in the court below, insisted in their briefs that the war produced an en-

---

DeJarnett, et al. v. DeGiverville, et al.

---

tire suspension of all proceedings whatever between the citizens of the respective sides and avoided all judicial process. The sale was made under a deed of trust containing an agreement that in default of payment when the notes matured, the trustee, upon giving the requisite notice, should proceed to sell the property to satisfy the debt. It contained a power coupled with an interest which was irrevocable in its character, and when the contingency arose calling forth its execution, the trustee was authorized to execute it regardless of the status of the grantors at the particular time. So far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the Confederate lines or in the jungles of India, or even if they were dead. It may be conceded that they were in a place or in a condition where it was physically impossible for notice to reach them, but that would not alter the case, as the notice was not designed to be given for their benefit in the sense of notice to them. It was intended to notify the community that the sale would take place in order that bidders might be present to purchase the property.

In the case of *Beatie vs. Butler* (21 Mo., 313), it appears that Beatie borrowed a certain sum of money, and, to secure its payment, he executed a mortgage, on real estate, containing a power of sale. Before the note was paid off Beatie died, and after his death the mortgagee sold the property. Neither the widow nor children of Beatie were notified of the sale. Afterwards they moved to set aside the sale, but the court denied the motion, holding that the death of the mortgagor did not extinguish or suspend the power of sale in the mortgage. Scott, J., in writing the opinion of the court, says: "The argument that the death of Beatie should have suspended all proceedings under the mortgage, in analogy to the suspension of all process of execution under the administration law against the estate of defendants, cannot be maintained. The law may suspend its own process. As it gives the process, it may regulate it. But deeds of trust and mortgages with a

power of sale, arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution. The statute of the 25th of January, 1847, is an answer to the argument. That statute, notwithstanding the death of the grantor, in a deed of trust, recognizes a right of sale in the trustee, though it is postponed for nine months after the death of the maker of the deed.

The precise question now under consideration arose in *Harper vs. Ely* (56 Ill., 179), where the court decided that the remedy of the holder of a mortgage in that State to make sale of the mortgaged premises in case of default, under a power in the mortgage, was in no wise impaired or suspended during the existence of hostilities in the late war of the rebellion, on account of the residence of the mortgagor and his grantee, subsequent to the mortgage, within the rebellious states; and that the rule applied as well to the grantee of the mortgagor, who always resided within one of the States, which, after conveyance to him, joined in the rebellion, as to the mortgagor himself, who, after making the mortgage, left his residence in one of loyal States for the purpose of engaging in hostilities against the government.

The very recent decision of the supreme court of the United States, in *Washington University vs. Finch*, reported in the *Central Law Journal* No. 6, 1874, is in point. In that case the facts are that Daly and Chambers purchased of W. G. Eliot in March, 1860, certain real estate in the city of St. Louis, and gave a deed of trust to secure the purchase money. In this deed Ranlett was trustee. The purchasers were citizens and residents of Virginia. Ranlett, as trustee, advertised and sold the premises in December, 1862, after the establishment of non-intercourse between the government and Confederate States. The United States Circuit Court declared the sale to be unlawful because of this non-intercourse, and set aside the deed made by the trustee. The Supreme Court unanimously reversed the judgment, and directed the Circuit Court to dismiss the bill. Mr. Justice Miller, who wrote the opinion, in commenting upon *Dean vs. Nelson*, *supra*, said



that the court had "never decided nor intentionally given expression to the idea that the property of citizens of the rebel States, located in the loyal States, was, by the mere existence of the war, exempt from judicial process for debts due to citizens in the loyal States contracted before the war." Upon the merits of the immediate case under consideration, the learned judge remarked: "The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainants had been dead, the sale would not have been void, for that reason, if made after the nine months during which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan, it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditor had both a legal and a moral right to have the power, made for his benefit, executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed on him before the war began. \* \* \* The interest of the complainants in the land might have been liable to confiscation by the government; yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country, or any other, is shown us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse between citizens of States which are in a state of public war with each other, but no case has been cited of this kind even in such a war.

It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, as it was impossible for such notice to reach the complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed, need only go to a place where the newspapers could not reach them, to delay the sale

indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit, by giving notoriety and publicity of the time, terms and place of sale, and of the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default, and his property liable to sale at any time, and no notice to him is required. \* \* \* We are of the opinion that the sale by the trustee in the case under consideration, was a lawful and valid sale, and that complainants' bill should have been dismissed."

This argument, it seems to me, is unanswerable, and is so remarkably clear and satisfactory, that nothing remains to be added. The judgment should be reversed, and the petition dismissed. Judges Vories and Sherwood concur; judges Napton and Adams dissent.

NAPTON, Judge, delivered the dissenting opinion of the court.

As the decision of the majority of the court, in this case, involves a question of considerable importance, and has been, unfortunately, so differently viewed by the most respectable judicial tribunals in this country, it is proper that the dissenting judges should state the grounds upon which their dissent is based.

To understand the point involved, it is necessary to state the facts on which the question of law in this case arises, and as it was raised by a demurrer to the petition, the facts stated in the petition are of course admitted.

These facts are, briefly, that the plaintiffs are citizens of Virginia, and had been from the inception of the contract out of which the controversy arose, which was long prior to the war of 1861—that they continued to be citizens of Virginia during the war, and were still such citizens, domiciled in that State, when this proceeding was instituted. They purchased some land in this county (St. Louis) in 1857, for which they paid one-fifth of the purchase money in cash, and for the re-

maining four-fifths, executed four notes, respectively payable in one, two, three and four years from date, which date was the 27th of April, 1857. They received a deed for this land, and to secure the purchase money not paid, executed a mortgage or deed of trust, which authorized the trustees to to sell the same if any of the notes should not be paid, upon a notice of such sale specified in the deed. All the notes were paid, except the last one, which fell due on the 30th of April, 1861. This last payment not having been made, the trustees advertised in 1862, and sold the land in conformity to the provisions of the trust deed.

The petition asserts that, on the 12th of April, 1861, and from that time forward, to the time of the sale, a war was existing between the Confederate States, of which Virginia was one, and the United States, to which Missouri adhered, and that the plaintiffs were citizens of the former, and subject to their laws. They aver that when the note fell due, on the 30th of April, they were ready and willing to pay the same, but were prevented from so doing by said war, and by their continued allegiance to the State of Virginia and to the Confederate government, of which Virginia was a part; that they had no notice of the advertisement, or sale thereunder, and therefore, ask to redeem.

To this petition there was a demurrer, which was overruled by the Circuit Court, and judgment for plaintiffs rendered thereon. But on appeal to this court, this demurrer is sustained, and the plaintiffs thereby declared to have no ground for redemption.

It will be seen from this statement, that this is not a case of a mortgagor who has died after or before forfeiture, or of a mortgagor who has gone to Japan, or some other inaccessible place, where notices could not be served on him, or of a mortgagor who has left his domicile for any purpose, or of a mortgagor who has gone from the United States to risk his fortunes with the Confederate States, or one who has been expelled from the states supposed to be loyal to the federal government, on account of suspicions of his disloyalty.

It is the case of a mortgagor who continues to live where he always has lived, so far as the record shows, and where, for aught that appears, he was born. I shall therefore, decline to give any opinion on the cases hypothetically stated—but will confine my opinion to the facts upon which the Circuit Court passed.

The question is very simple: whether a mortgage, or deed of trust, executed by a citizen of Virginia in 1857, to a citizen of Missouri, which requires the payment of a sum of money on the 30th of April, 1861, is forfeited by a failure to pay the money on that day, and whether the trustee or mortgagee may sell the mortgaged premises, for such failure of payment, occurring after the beginning of war between the countries where the parties are respectively domiciled.

That the war between the United States and the Confederate States attained the dignity of a civil war, and made both parties to it occupy the position of belligerent sovereignties, has so often been conceded in the decisions of the highest judicial tribunals of the United States, constituting the judicial department of the government that succeeded, and by the cases cited in the opinion of the majority of this court, that I might be excused from repeating the citations. But I prefer to recall the language of the courts in those cases, as explanatory of their position.

In *Brown vs. Hiatts*, (15 Wall., 177) Mr. Justice Field says: "It is unnecessary to go at length over the grounds upon which this court has repeatedly held that the statutes of limitations of the several states did not run against the right of action of parties during the continuance of the civil war. It is sufficient to state that the war was accompanied by the general incidents of a war between independent nations; that the inhabitants of the Confederate States, on the one hand, and of the loyal States on the other, became thereby reciprocally enemies to each other, and were liable to be so treated, without reference to their individual dispositions or opinions; that during its continuance, all commercial intercourse and correspondence between them were interdicted

---

DeJarnett, et al. v. DeGiverville, et al.

---

by principles of public law, as well as by express enactments of congress; that all contracts previously made between them were suspended, and that the courts of each belligerent were closed to the citizens of the other."

It may not be inappropriate to quote further from this opinion—which proceeds thus: "As the enforcement of contracts between enemies, made before the war, is suspended during the war, the running of interest thereon, during such suspension, ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation or damages, when the payment of the principal debt was interdicted."

As this case declares the war of 1861 to have been accompanied with the same consequences as followed a war between independent sovereignties, we may with propriety recur to a decision of the Supreme Court of Pennsylvania, in regard to the effect of another war, originating in a rebellion—and a successful one—and which was placed on the same footing with the one to which Mr. Justice Field referred.

In *Hoare vs. Allen*, decided by the Supreme Court of Pennsylvania, in 1789, (2 Dal., 102) the court say: "This action is brought on a mortgage for £16,000, payable on 4th Dec., 1774. No suit could be brought on the mortgage before the 4th Dec. 1775. Before that period the war commenced, and on the 10th September, 1775, the congress prohibited the exportation of commodities, etc., to Great Britain, or any of her dominions. This was obligatory on their constituents, and it became unlawful to make any remittances after this, to the enemy. During a war, all civil actions between enemies are suspended; debts are suspended also, but restored by the peace. For the term of seven and a half years, viz: from 10th September, 1775, to 10th March, 1783, the defendant could not have paid this money to the plaintiff, who was an alien enemy, without a violation of the positive laws of this country, and of the laws of nations. They ought not, therefore, to suffer for their moral conduct and their submission to the laws."

That case is evidently exactly like the present, except that it related to a successful rebellion against Great Britain, on which our independent national existence is based, and may, on this account, be repudiated as inapplicable to the recent war in which rebellion was unsuccessful. It was the case of a mortgage given by a citizen of Pennsylvania to a subject of Great Britain, and the court declare that since all intercourse with Great Britain, when the mortgage money fell due, was prohibited by the congress of the United States and by the laws of nations, the failure to pay to the alien enemy did not and ought not to produce a forfeiture of the mortgage, or an exaction of damages in the shape of interest for the non-payment of the principal, at a time when the law prohibited its payment. I am unable to distinguish it, in principle, from this case, and it was decided by a court which historically occupies a very high place in American annals, and the opinion was delivered by Ch. J. McKean, associated with judges Shippen, Yeats and Bradford, a court whose bar contained such names as Sergeant, Ingersoll, Duponceau, Lewis, Rawle, Dallas and Tilghman. And, from a note appended by Mr. Dallas, the reporter (himself not unknown in our judicial and political annals), it appears that Mr. Jefferson, when Secretary of State, in his reply to Mr. Hammond, the British minister plenipotentiary, had maintained the same doctrine with the Pennsylvania court, concurring as it did with that subsequently maintained by the Supreme Court of the United States, as announced by Mr. Justice Field. And, although Mr. Jefferson is chiefly known as a great statesman, he was also a lawyer by profession, and a very learned one, and he maintained the same doctrine enunciated by the Supreme Court of Pennsylvania, and referred to English authorities in support of it, and to the adjudications of New York, Maryland and Connecticut, though he admitted that if the creditor had an agent in this country during the war, to whom the money could be paid, the result might be different. (2 Dall., 104.)

We may quote further from the opinion of the court in that case: "Interest is paid for the use or forbearance of money.



---

DeJarnett, et al. v. DeGiverville, et al.

---

But in the case before us, there could be no forbearance; because the plaintiff could not enforce the payment of the principal; nor could the defendants pay him, consistently with law; nor could they pay it without going into the enemy's country, where the plaintiff was. Where a person is prevented by law from paying the principal, he shall not be compelled to pay interest during the prohibition, as in the case of a garnishee in a foreign attachment."

And the court says further:

"It is urged, that a remittance of bills of exchange furnished the enemy with no money, yet it is clear that it would furnish the enemy with the means of carrying on the war within the bowels of the country without bringing any money into it."

And in conclusion, Chief Justice McKean says:

"I have searched for precedents, both in the civil law and in the books of reports; but could find none. We, therefore, determine on principle and analogy, and are unanimously of opinion, that the plaintiff is not entitled to interest from the 10th September, 1775, to 10th March, 1783." This was the decision of a court composed of judges eminent for ability and learning, and made just after the close of our revolutionary war with Great Britain. And the same doctrine is maintained by the Supreme Court of the United States during the second war with Great Britain, and is thus stated by Judge Story in the case of the *Julia* (8 Cranch, 18): "I lay it down as a fundamental proposition, that, strictly speaking, in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse." (Bynkershook and Valin are then quoted.) And this eminent judge then proceeds to say: "From this last expression it seems that Valin did not understand the interdiction as limited to mere commercial intercourse."

In the elaborate judgment of Sir W. Scott in the Hoop (1 Rob A. & M., 196), the illegality of commercial intercourse is fully established as a doctrine of national law ; but it does not appear that the case before him required a more extended examination of the subject. The black book of the admiralty contains an article which deems every intercourse with the public enemy an indictable offense. \* \* "But, independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war, every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government and to counteract the measures of its enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war or foster the resources, or increase the comforts of the public enemy, is strictly inhibited. No contract is considered as valid between enemies, at least so far as to give them a remedy in the courts of either government, and they have, in the language of the civil law, no ability to sustain a *persona standi in judicio*."

The same doctrine is reiterated by Mr. Justice Johnson in the case of the Rapid, 8 Cranch, 155: "As to the nature and consequences of a state of war, there was really (he said) no difference of opinion among jurists. In the state of war, nation is known to nation only by their armed exterior, each threatening the other with conquest or annihilation. The individuals who compose the belligerent States exist as to each other in a state of utter seclusion. If they meet, it is only to combat. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked on one common bottom and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country."

And the learned and eminent chancellor who reviewed this subject in Griswold vs. Waddington (16 Johns. 482,) says: "I

think I may venture to hazard the assertion, without any imputation, after the examination which has been given to the subject, that there is no authority in law, whether that law be national, maritime or municipal, for any kind of private, voluntary, unlicensed business, communication or intercourse with an enemy. It is all noxious, and in a greater or less degree, it is all criminal. Every attempt at drawing distinctions has failed—all kind of intercourse except that which is hostile, and created by the mere exigency of war and necessity of the case is illegal. The law has put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety in the principle, and every relaxation of it tends to corrupt the allegiance of the subject and prolong the calamities of war. The idea that any remission of money may be lawfully made to an enemy is repugnant to the very rights of war," etc.

And it may be noted, that Chancellor Kent, in his elaborate opinion in this case, expressly holds, that "a formal declaration of war is not necessary by the usages of Europe, and war may begin by mutual hostilities as well as by a declaration. \* \* In the war which occurred between England and France in 1778, the first public act on the part of the English government was the withdrawing of its minister from France, and that single act was declared by France to be the first breach of the peace. There was no other declaration of war."

These principles are, however, fully recognized by the present Supreme Court of the United States and applied to the war between the Confederate States and the United States.

In the *United States vs. Grossmayer* (9 Wall., 75), Mr. Justice Davis says: "A prohibition of all intercourse with an enemy during the war affects debtors and creditors on either side equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine, that a resident in the territory of one of the belligerents may have, in the time of war, an agent residing in the territory of the other, to whom the debtor could pay his debt in money or deliver to

him property in discharge of it; but in such case, the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced."

In *Coppell vs. Hall* (7 Wall., 557), Mr. Justice Swayne says: "The payment of money by a subject of one of the belligerents in the country of another is condemned, and all contracts and securities looking to that end are illegal and void." And the cases of *Brown vs. United States*, and the *Rapid and the Julia*, and the case of *Griswold vs. Waddington*, are referred to and sanctioned. Upon these authorities, it may be assumed, that the mortgagor domiciled in Virginia could not on the 30th of April, 1861, pay his note due on that day.

Mr. Chief Justice Chase, in the case of *Bigler vs. Waller*, said: "The actual beginning of the war against the United States, doubtless preceded the proclamation of the President of the 15th of April, 1861, calling out the militia to suppress insurrection; but the proclamation declaring a blockade of the ports of the insurgent States must be regarded as the first formal recognition of the existence of a civil war by the national government. That proclamation was issued on the 19th of April, and that date, therefore, must be taken as the date of the commencement of the war."

And the facts show (See U. S. Stat. at Large, Vol. 12, p. 1258), that the first proclamation of President Lincoln is dated the 15th of April, and the second on the 19th, and the third on the 27th. Without, therefore, resorting to the opinion of Chancellor Kent, that actual hostilities indicate a war more loudly than proclamations, we may safely conclude, that on the 30th April, 1861, when the last note on this purchase became due, there was an existing war between the Confederate States and the United States, and that Virginia was one of the Confederate States.

The question is, then, whether Mr. DeJarnette could have paid this note on the 30th of April, 1861; and this question is answered by all the cases I have cited in one way. The mortgagor had no right or power to pay the note, and the mort-

gagee had no right to receive it. And the only remaining question is, whether the non-payment of the note, which fell due on the 30th of April, 1861, which the law of nations prohibited the plaintiffs from paying, would authorize a sale and effect a forfeiture of the mortgagor's rights. The majority of this court have decided that it would, but I cannot concur in this decision either on principle or authority. On principle, I would have great difficulty in apprehending a proposition which would involve the necessity of conceding a forfeiture of right by any one who observed the law of the country in which he was domiciled. I cannot distinguish between the successful and the unsuccessful party.

On authority, I refer to the case of *Dean vs. Nelson*, (10 Wall., 158.) In that case, Mr. Justice Bradley, in delivering the opinion of the court, says: "the great question in the cause is whether the equity of redemption has been extinguished."

In considering that question he does not place the decision on any deficiency of power in the court which foreclosed the mortgage; for that court, though established under the protection of the United States army, was a tribunal for the adjudication of civil cases exclusively, and had no military authority whatever; but he says, "the defendants in the proceeding were within the confederate lines at the time, and it was unlawful for them to cross these lines. Two of them had been expelled from the Union lines by military authority, and were not permitted to return. The other, Benjamin May, had never left the confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see or obey it. As to them the proceedings were wholly void and inoperative."

And he concludes thus: "This leaves the equity of redemption in the mortgaged property unextinguished, and it is therefore the right of the appellees to redeem it."

It will be observed that the decision in this case of *Dean vs. Nelson*, goes further than it would be necessary on the facts of the present case to hold, in order to sustain the plaintiff's petition. In that case it appears that one of the debtors

was within the federal lines, when the money became due, and might have paid it; whereas, in the present case, when the note became due for which the trustee sold, the debtors were in Virginia, subject to the confederate government, and were prohibited from paying by the laws of the country. But the court in *Dean vs. Nelson*, held the whole proceeding to foreclose a nullity, because the notice required in the mortgage could not be given so as to impart any information to the mortgagors within the confederate lines, and although one of the debtors was within the federal lines, when the obligation matured, and might have paid it, yet as the proceeding to foreclose was commenced and carried on after the expulsion of the debtors into the confederate lines and where no notice of such proceedings could possibly reach them, the right to redeem was maintained and allowed.

This judgment in *Dean vs. Nelson* was, in my judgment, in conformity to the law of nations, which has been defined as "*id quod naturalis ratio inter omnes homines constituit*," and emanating as it did from the highest branch of the judicial department of this government, conceding to the defeated party in the war the same rights in courts of justice that would of course be accorded to those who had the merit of "loyalty," I am not disposed to abandon it, and I believe that the Supreme Court of the United States have recently reaffirmed this decision in *Lasere vs. RocherEAU*, (17 Wallace, 437).

I can never assent to the proposition that a compliance with and submission to the law will produce a forfeiture. All contracts are made subject to the implied power of the government to which the parties belong, to interfere with them, and to suspend them, and perhaps annul them in time of war. No default can arise from a compliance with the law.

This opinion of the Supreme Court of the United States was followed by the Supreme Court of the District of Columbia in the case of *Green vs. Alexander*, and by the Circuit Court of the United States for the southern district of New York, in the case of the *Kanawha Coal Company vs. The*



Kanawha & Ohio Coal Company, and by the learned judge of this circuit (Mr. Justice Dillon,) and the same principles are maintained in the learned opinion of the Circuit Court of the United States for the western district of Tennessee, in *Tait and others vs. The New York Life Insurance Company*: In the case of *Semmes vs. City Fire Insurance Company*, reported in 36 Conn. 543, in an appendix, the district judge, Shipman, made the same decision, which is reported at length, and is, in my opinion, in accordance with the law and the authorities. This decision was made in 1869, and I quote from it as coming from a tribunal in a State having no sympathy with the southern confederacy, but still willing to adhere to the positions where the *jus gentium* would lead. Judge Shipman says the replication sets up the late rebellion and alleges that a state of war existed between the organization known as the Confederate States, including the State of Mississippi, and the United States, from the 15th of April, 1861, to the 2nd of April, 1866, whereby it is claimed that this contract and all right to sue upon it was during all that time suspended. There is no allegation that the courts of Mississippi or the national courts in that State were closed for any specific length of time, nor that the plaintiff or his intestate labored under any personal disability arising out of his actual participation in the war, nor that he was under the control of any *vis major*, beyond what the law implies from the state of war. The whole question therefore turns upon the legal consequences of the war in their operation on this contract, and the length of time these consequences continued.

"It is of course conceded that a state of war, recognized as such by and between the belligerent parties, suspends all contracts in existence between the citizens of the respective belligerents at the time the war commences. The authorities are uniform on this subject. The general rule is well stated by Mr. Justice Nelson in *Prize Cases*, 2 Black., 687. The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international

law. The people of the two countries become immediately the enemies of each other; all intercourse, commercial or otherwise, between them is unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence utterly void."

"This doctrine has been repeatedly recognized and applied to our late civil war by the courts of this country, both State and National."

"It is equally well settled that, upon the termination of the war, obligations contracted before its commencement between the respective subjects, though the remedy for their recovery is suspended during the war, are revived."

"In *Hanger vs. Abbott*, and *Jackson Insurance Company vs. Stewart*, this doctrine was applied to the statutes of limitation. In the former case Mr. Justice Clifford, speaking for the court says: "When a debt has not been confiscated, the rule undoubtedly is that the right to sue revives on the restoration of peace." And Mr. Chitty says, that, with the return of peace we return to the creditor the right and the remedy; unless we return the remedy with the right, the pretense of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time, during which both the right and the remedy were suspended."

"Applying this doctrine to the present case, it follows that the war in which the people of Mississippi on one side, and those of Connecticut on the other, participated, suspended the contract with all its incidents, including the condition set up in bar of this action and all rights of action under it."

"In view of the result to which I have come, it is unnecessary to determine the precise date of the beginning of the war, when this suspension commenced. It is immaterial whether we take the 15th of April, as stated in the replication—the date of the president's proclamation calling for volunteers—or the 19th of April, when, by proclamation he declared that an insurrection had broken out in certain States, including Mississippi, and declared his purpose to blockade the ports."

"As the contract and all remedies under it were absolutely suspended by the war, no suit could have been brought while that suspension continued."

"I have already shown that by the rules of public law, universally recognized among civilized nations, as well as by the decisions of our own courts, the existence of this war suspended all contracts between the citizens of the respective belligerents, entered into before it commenced. It rendered for the time being, all commercial intercourse between the citizens of the two sections unlawful and converted them into enemies."

And referring to the proclamation of President Lincoln in August, 1861, the learned judge adds:

"By force of this proclamation then, and the statute authorizing it, as well as by the legal effects of the war then existing, all pre-existing contracts between the people of the respective belligerents, including the right to enforce them by judicial proceedings, was thenceforth suspended."

I am not aware of any peculiarity of mortgages or deeds of trust which distinguishes them from other contracts for the security of money, so as to exempt them from the operation of the laws of war. Nor can I understand how a trustee or a mortgagee can claim to have more power in passing a title and dispensing with notices, than a court of competent jurisdiction over the subject.

I am therefore in favor of affirming the judgment of the Circuit Court of St. Louis, both at Special and General Term. And in this opinion Judge Adams concurs.

---

Spears v. Ledergerber, Adm'r of Sargent.

---

JAMES B. SPEARS, Respondent, *vs.* FREDERICK T. LEDERGERBER, Adm'r of LEONARD R. SARGENT, Appellant.

1. *Attorney—Power of to compromise claim.*—An attorney has no authority, arising from his employment in that capacity, to compromise the claim of his client.

*Appeal from St. Louis Circuit Court.*

*F. J. Bowman*, for Appellant.

*Leverett Bell and J. Q. Adams Fritchey*, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This case arose in the Probate Court of St. Louis County, in consequence of a motion filed by Spears, in whose favor a claim had been allowed against the estate of Sargent, to compel Ledergerber, the administrator of that estate, to pay the amount of such claim, less the sum of \$200, already received thereon by John W. Moody, the attorney of claimant. Said motion stated that Moody had signed a receipt for said \$200, as in full satisfaction and discharge of the claim; but that his act in this regard was unauthorized.

An appeal from an order of the Probate Court, sustaining this motion, was taken to the Circuit Court, where a jury was impaneled, and by consent of the parties, this special issue was submitted to them:

"Whether John W. Moody, on or before the 11th day of February, 1869, was authorized by James B. Spears to receive from the administrator of the estate of Leonard R. Sargent, deceased, the sum of two hundred dollars in full settlement and discharge of the claim which had been allowed in the Probate Court of St. Louis County, on the 24th day of December, 1868, in favor of the said James B. Spears, and against said estate."

The jury found the issue, thus submitted, in favor of the claimant, and their verdict was amply supported by the evidence. Indeed, it might more properly be said that all the evidence in the case was on the side of Spears, because there was no testimony whatever, on behalf of the defendant, having the slightest tendency to show that Moody, either in consequence of prior authorization, or subsequent acquies-

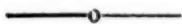
---

Messick v. Ledergerber Adm'r of Sargent.

---

cence, was empowered to compromise the claim placed in his hands. And the law is too well settled to admit discussion, that an attorney has no authority arising from his employment in that capacity, to compromise the claim of his client. Such authority, whenever it exists at all, does so by reason of the client specially and expressly conferring on his attorney the power to effect the compromise in the given case. The instructions, which the court, at its own instance, and on request of the plaintiff, and also on the part of the defendant, gave to the jury, clearly presented the controlling question in the case, which was in reference to the authority of Moody to make the compromise on which the defendant relied—so that, even if the instructions which were refused on the part of defendant, had been unobjectionable, no possible injury could have resulted from their refusal.

As the whole case hinges upon the authority of Moody to act as he did in relation to the claim, and as the evidence adduced disclosed not the slightest semblance of such authority, it would be idle to discuss other points than the ones already noticed, as they could have no possible bearing on the conclusion at which we have arrived, that the judgment must be affirmed. Judge Wagner absent; The other judges concur.



ABRAM MESSICK, Respondent, *vs.* FREDERICK T. LEDERGERBER,  
Adm'r of LEONARD R. SARGENT, dec'd, Appellant.

1. *Spears vs. Ledergerber*, ante p. 465, affirmed.

*F. T. Bowman*, for Appellant.

*Leverett Bell*, with *J. Q. A. Fritchey*, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This case is, in its essential features, the same as that of *Spears vs. Ledergerber*, decided at the present term, and for like reasons, the judgment of the court below will be affirmed. All concur, except Judge Wagner, absent.

---

Briggs v. Munchon.

---

JANE BRIGGS, Respondent, vs. CHARLES W. MUNCHON, Appellant.

1. *Sales—Statute of frauds—Auctioneer—Memoranda—Names of parties—Principal and agent—Description of property.*—The memorandum of a sale of land by an auctioneer, as made by his clerk, was prefaced by an advertisement, pasted in the book, which contained the name of the tract sold, which was well known, and a partition of which was recorded, and stated that it was sold by order of the heirs of the estate to which it belonged, naming it; described its location in general terms, and referred to lithographic plats to be ready at the day of sale. On the margin was a note, "sold on account of A." On the sale, the clerk made a minute immediately following the advertisement as follows: "Lots 1 and 2, C. D," (the name of the purchaser,) "111, \$15, \$1,665.00." It was admitted by the pleadings, that the auctioneers were the agents of the heirs of said estate. *Held*, that the note on the margin did not indicate that the memorandum of sale showed an agreement of the purchaser with A.; it might show that A. had an interest without necessarily implying that he was the contracting party; that the memorandum and the advertisement taken together sufficiently disclosed the principal for whom the auctioneers acted, and if they did not, parol evidence was admissible for that purpose; that the name of the tract being well known, and by its very title referring to a partition and plat which were of record, was a sufficient description of the property for the purposes of the memorandum; and that the writing of the name of the purchaser by the auctioneer's clerk was a sufficient signature under the Statute of Frauds.

*Appeal from St. Louis Circuit Court.*

R. S. Voorhis, for Appellant.

The defense in this case arises under the Statute of Frauds. (Wagn. Stat., p. 438, § 5.)

The "Field Book," or so much as purported to contain the contract sued on, was inadmissible to prove the contract pleaded in the petition. That contained in the "Field Book," and put in evidence is at variance with the contract set up in the petition. First—The contract put in evidence, on its face shows a contract with John Riggin, Jr. He is the contracting party. Parol proof was introduced to show, that although John Riggin, Jr., is named in the memorandum as the contracting party, he was not such, but that Jane Briggs, not at all named in the memorandum, was the contracting party. The evidence was clearly inadmissible. (Higgins vs. Senior, 8 Mees. & W., 843; Wilson vs. Bailey, 1 Handys, 178; Kean vs. Davis, Spencer, N. J., 425.)



Second—The name of the plaintiff does not appear in the memorandum as the contracting party. When parol proof is admitted to explain the memorandum offered in evidence so as to substitute Jane Briggs for John Riffin, Jr., for this is really what has been done in the case, additional parties are introduced and the memorandum is made a joint contract by several persons, instead of a contract with Jane Briggs, which is attempted to be proved by the memorandum. In other words, a contract with several persons jointly is introduced to prove a contract alleged to have been made by one person, which is a fatal variance. The memorandum shows a joint contract, whereas a personal contract is pleaded. (Sugd. on Vendors, 130; Davis vs. Symonds, 1 Cox. Ch., 409; Story on Sales, §§ 466-7; Hilliard on Sales, p. 482, § 28; Hicks vs. Whitmore, 12 Wend., 548; Craig vs. Godfrey, 1 Cal., 415; Horton vs. McCarty, 53 Me., 394; Buckmaster vs. Harrop, 13 Ves., 456; Smith vs. Arnold, 5 Mason, 414.) Story on Sales, § 257, Note 1, cases cited.)

The printed portion of the memorandum shows two facts patent. First—That the sale was on account of the heirs of the Briggs estate; a sale by the heirs of Briggs. Second—That the sale was of a joint property. It implies a joint property, undivided, in the heirs of Briggs. (Story on Sales, § 257; and Note 1, cases cited; *Id.*, § 46.)

*T. K. Skinker*, for Respondent.

Whatever the words "Sold for account of John Riffin, Jr.," might import if unexplained, the explanation of Riffin's connection to the transaction, as detailed by himself, clears away any inference that he was the other party to the contract. He was no more than a speculator at whose expense the sale was to be conducted and to whom the auctioneers were to look for compensation for their services. His testimony cannot be objected to by defendant as explaining a writing by parol evidence, because it was drawn out on cross-examination by defendant himself.

Whether the language of the memorandum is sufficiently precise as to the ownership or not, can make no difference.

---

Briggs v. Munchon.

---

Granting it to be equivocal, it is certainly legitimate to resort to the pleadings for any facts that may explain it, and the pleadings and evidence clearly show it. (Browne Stat. Frauds, § 350.)

The memorandum shows the property sold was in the Briggs Estate and was lots 1 & 2, block 3. The Briggs Estate is in St. Louis county, Missouri, and was partitioned by commissioners and subdivided into lots, and the plat of the subdivision recorded in the office of the Recorder of Deeds for the county. The lots could not be more certainly identified.

As to the objection, that the name of the plaintiff does not appear in the memorandum;—Defendant's name appears in full in the memorandum.—Plaintiff's name does not appear, but in place of it we find those of her admitted agents, Belt and Priest. That is enough. If the name of the agent appears, that makes it the contract of the principal. The principals need not appear, whether the case comes under the statute of frauds or not. (Cato vs. Hutson, 7 Mo., 142, 148; Higgins vs. Dellinger, 22 Mo., 397; Wiley vs. Robert, 27 Mo., 388; Higgins vs. Senior, 8 Mees. & W., 844; Trueman vs. Loder, 11 Ad. & Ell., 589; Ford vs. Williams, 21 How., 289; Yerby vs. Grigsby, 9 Leigh, 391; Hubbert vs. Borden, 6 Whart., 79; Bank of U. S. vs. Lyman, 20 Verm., 673, 674; Williams vs. Bacon, 2 Gray, 393.)

Where the writing does not purport to be the contract, but only a memorandum of it, resort may be had even to parol evidence to explain it. (Rollins vs. Claybrook, 22 Mo., 405; Moss vs. Green, 41 Mo., 389.)

As a defendant may be charged on a contract wherein only his agent's name appears, so may a plaintiff avail himself of such a contract and maintain an action on it. (Browne Stat. Frauds, § 373; Bateman vs. Phillips, 15 East., 272; Salmon Falls Manuf'g Co. vs. Goddard, 14 How., 446; New Jersey Steam Navig'n Co. vs. The Bank, 6 How., 380; York County Bank vs. Stein, 24 Md., 464; Brooks vs. Minturn, 1 Cal., 481; Beebe vs. Robert, 12 Wend., 413; Taintor vs. Prendergrast, 3 Hill., 72; Sims vs. Bond, 3 Barn & Ad., 38;

Cathay vs. Fennell, 10 B. & C., 672; Beckham vs. Drake, 9 Mees. & W., 79; Same Case, 11 *Id.*, 315; 1 Parson's Bills & Notes, 102; Higgins vs. Dellinger, 22 Mo., 397; Higgins vs. Senior, 8 Mees & W., 844.)

When the fact of agency is expressly admitted, as in this case, there can be no doubt that an unnamed principal can avail himself of it.

SHERWOOD, Judge, delivered the opinion of the Court.

Action to recover of defendant the amount bid by him, at auction sale, for lots 1 and 2 in block 3 of the Briggs' estate, in St. Louis County, Missouri. Belt & Priest were the auctioneers, and at the trial, the plaintiffs, having established its authority, read in evidence so much of a book kept by them, as contained the entries of sales made by them on the 29th day of September, 1870, and especially the entry of the sale of the lots alleged to have been sold to the defendant.

The book was entitled: "Auction Sales, Belt & Priest, 1869, 1870." The particular entry was as follows: "Thursday, September 29th, 1870. Briggs estate. Positive and unrestricted sale of lots for non-resident heirs. Sold for account of John Riffin, Jr. September 29, 1870. On the premises. We are directed by the heirs of the Briggs estate, to sell at public auction, on the premises, all the lots belonging to said estate unsold. This subdivision is situated on both sides of the Clayton road, a short distance west of the intersection of the Clayton and Manchester roads, about half a mile west of the city limits, and a short distance north-east of the Laclede race track subdivision. There are about 150 lots, 25 by 150 feet, fronting wide streets and alleys. The terms will be one-third cash, balance in one and two years, with six per cent. interest. The title is perfect; warranty deeds will be given. The horse railroad from Summit Avenue and Market Street to Shaw's Garden, will be in operation in a short time, affording easy access to the property from the center of the city. The beautiful location, and the accessibility of this property, recommend it to all seeking suburban lots. Lithograph

---

Briggs v. Munchon.

---

plats are now being prepared, and will be ready for distribution on the 15th inst. Belt & Priest, 219 Chestnut Street. Block 3, lot 1 and 2. C. W. Munchon, 111 \$15.00,—\$1665.00."

The above recited advertisement of Belt & Priest, was pasted in their book on the morning of the day of sale, and the written memorandum, as to John Riggins, was written before the sale occurred; and that as to whom the lots were sold, and price, etc., were written therein on the same day, and at the time of the occurrence of the sale, by the clerk of the auctioneer. The sale took place at the time advertised, and defendant, who lived within a short distance of the property, and owned land adjoining the Briggs estate, was present on the ground where the lots were being sold, bid on them, and they, after a considerable contest, were stricken off to him at the price above indicated. Plats of the lots to be sold were circulated at the time of the sale, and the terms thereof were announced prior thereto orally, also by the advertisements in the papers and by hand-bills posted on the property. It was averred in the petition and not controverted in the answer, that the lots in question were the property of the plaintiffs, situate in St. Louis County Missouri, and were part of the "subdivision known as the Briggs Estate, according to the report and plat of the commissioners in-partition, in the case of Edmond B. Briggs. *et al.*, *ex parte*., recorded in the office of the recorder of deeds for said county, in book No. 321, page 146," etc. Nor did the answer deny the allegations of the petition to the effect that Belt & Priest were the agents of the plaintiff, duly authorized by her to make the sale referred to. The agency of Belt & Priest was also established during the progress of the trial, and also that the Briggs heirs owned separate interests which had been allotted to them in severalty, by the commissioners appointed for the purpose of making partition of the estate among those entitled.

Various objections to the introduction of the memorandum of sale were urged by the defendant, who still insists that those objections were tenable, and should have prevailed. John Riggins's connection with the sale and the cause of his

name appearing in the margin of the page which evidenced that sale, was sufficiently and satisfactorily accounted for by the testimony of Riggins himself, drawn out by the defendant on cross-examination. It seems that the heirs had agreed to give Riggins all that the property would bring above a certain figure, he to defray the expenses of the sale, and to make good any deficit which might occur. This testimony having been elicited by defendant, he cannot complain if it had a seeming tendency to vary, explain or control a written instrument by parol evidence. But it is not true in point of fact, that the memorandum shows on its face an agreement with Riggins and not with plaintiff. The idea of plaintiffs being the contracting party is not, by any means, at variance with the idea that Riggins was, on the occurrence of a certain contingency, to receive a portion of the proceeds of the sale. Nor do the words employed, themselves indicate, if they are fairly construed, that he occupied the attitude of contractor.

This disposes of the defendant's first objection. The second and third objections may be disposed of together. There was no necessity for the name of the plaintiff to appear in the memorandum, and this is the case, notwithstanding that the statute of frauds, as a general rule, requires the names of both the contracting parties. (Brown on Stat. Fr., § 372.) Belt & Priest, as before seen, were by the pleadings admitted to be the agents of the plaintiff, and violence must be done to all fair and reasonable rules of construction in the attempt to show that the advertisement, which was incorporated into and became a part of the memorandum itself, did not disclose in a very evident manner, their agency. And to prove who their principal was, resort was even allowable to parol evidence; such resort had no tendency in contravention of the rule forbidding the introduction of extraneous evidence of that sort in certain cases. In *Higgins vs. Senior*, (8 Mees. & Welsb., 844) Baron Parke said: "There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons and acted as such agents in making the contract, so as to give

the benefit of the contract on the one hand, and to charge with liability on the other, the unnamed principals, and this, whether the agreement be or be not required to be in writing by the statute of frauds, and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is, in law, the act of the principal." (See to the same effect, *Trueman vs. Loder*, 11 Adolph & Ell., 589; *Ford vs. Williams*, 21 How., 287, and cases cited; *Higgins vs. Delinger*, 22 Mo., 397.)

And it is but a legitimate corollary from the above enunciated rule, which permits an undisclosed principal to avail himself of the contract made by his agent; and maintain action thereon, although the contract be written, and the evidence, adduced to disclose the relation which the apparent bears to the real principal, is parol. (*Bateman vs. Phillips*, 15 East., 272; *Bro. Stat. Fr.*, § 373.)

These observations, in full accord with the the above cited authorities, effectually remove any ground of objection because of the non-appearance of the plaintiff's name in the memorandum, and because of the employment therein of the term, "heirs of the Briggs estate." For if the admissibility of parol evidence to disclose an unknown principal be granted, any alleged obstacle or ambiguity vanishes upon its introduction.

This view renders a discussion of defendants fourth and fifth objections unnecessary. Passing, then, to his last ground why the memorandum should have been rejected, which is, that the description of the property is uncertain and indefinite; that remaining point will now be examined. And in the course of such examination, we must not be unmindful of the established and admitted facts heretofore mentioned, that the lots concerning which the present suit arose, were part of the "subdivision known as the Briggs estate;" that partition had been made thereof by commissioners, whose re-



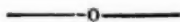
port and plat, in the *ex parte* cause of E. B. Briggs and others, was of record in the county where the proceedings for partition were instituted.

In *Wiley vs. Robert*, (27 Mo., 388) the memorandum of sale was in these words: "Partition, lands, Louis Robert vs. B. F. Adams. Lot No. 11—274, 80—100 a. Louis Robert, \$10.50 per a.—2,885.40." And it was held sufficient; the court observing that "the title of the partition suit being placed at the head of the memorandum of the sale, connected the papers in that case with the memorandum, for the purpose of this inquiry, as perfectly as if they had been specially referred to and made a part of it." (The doctrine of the case just cited, was afterwards re-affirmed in 31 Mo., 212, upon the cause coming up here for the second time.)

That case is not distinguishable in principle from the one at bar. Here the advertisement, which was part and parcel of the memorandum, refers to the lots yet remaining unsold, belonging to the subdivision, of the "Briggs estate." That such subdivision was well known by that name, and its location and boundaries a matter of record, stands admitted. Greater certainty than this could not, with any show of reason, be demanded. The mention of county and State in the memorandum, would not have aided in the identification of the property sold; those usual methods of defining the situation of the land sold, are not absolutely requisite. The mode employed in the present instance was, to all intents and purposes, equally efficient and significant. The plats mentioned in the notice of sale could, under the circumstances, only have reference to the lithographic copies of the one filed in the recorder's office by the commissioners in partition; and for this reason, such copies were admissible in evidence, although, as seen from the foregoing remarks, their admission, the identity of the property having been otherwise sufficiently established, was not, perhaps, strictly necessary. It was competent for the clerk of the auctioneers to write down the name of the defendant in the sale book, at the time the sale took place, and this was a sufficient signature, within the statute. And

the act of the clerk in this respect, was that of the auctioneers, and properly declared on as such, so there was no variance between the matters alleged and those proven, and even had there been any variance, the steps pointed out by the statute for taking advantage of it, were not pursued. (2 Wagn. Stat., § 1, p. 1033; 49 Mo., 404; 51 Mo., 501; see Sm. Merc. Law, 587; Bird vs. Boulter, 4 B. & Ad., 443; Emerson vs. Heelis, 2 Taunt., 38; 7 East, 558; Gill vs. Bicknell, 2 Cush., 355.)

Having discussed all the points in this record which are of any practical importance, and being unable to discover any error, the judgment must be affirmed. Judge Wagner absent; the other judges concur.



JULIUS F. SCHNEIDER, Respondent, vs. CHARLES MEYER, *et al.*,  
Appellants.

1. *Judgment—Satisfaction of—Notes given for.*—A note given by a judgment debtor to the judgment creditor for the amount of the debt, but designed only to fix the time for payment, and which being unpaid at maturity is returned to the maker, is not a satisfaction of the judgment; and the co-defendants of the debtor, against whom judgment has also been rendered, are not entitled, on account of said note, to have the judgment entered as satisfied. The delivery of such note, to plaintiff is not a satisfaction of the judgment either at law or in equity.
2. *Equity—Practice, civil—Motions—Relief.*—Where a motion is made under a statute for a particular remedy therein provided, it is not competent for the court, on that motion, to grant other equitable relief which is not embraced in or relied on in the motion.

*Appeal from St. Louis Circuit Court.*

W. B. Thompson, for Appellants.

Rudolph Schulenburg, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This was a motion filed under the provisions of the 24 Sec. of the statutes of this State concerning Judgments. (Wagn. Stat., 792.)

The motion was filed in the St. Louis Circuit Court in March, 1872. The facts, as they appear in the record, are about as follows:

On the 20th of September, 1869, the plaintiff recovered a judgment against the three defendants, named in the caption, before a Justice of the Peace of St. Louis county, for the sum of \$200 and costs, upon which an execution was issued and returned not satisfied. After this, the plaintiff caused a transcript of the judgment to be filed in the office of the Clerk of the Circuit Court of St. Louis county, as provided by law. The judgment before the justice was recovered on a promissory note executed by all three of the defendants to the plaintiff. Plaintiff also had two other judgments against defendant, Meyer, for the sum of two hundred dollars each. The defendants, Stueck and Hertz, were the sureties of defendant, Meyer, on the note upon which the judgment was rendered against them. On the 30th day of September, 1869, ten days after the judgment was rendered by the justice of the peace against the defendants, the defendant, Charles Meyer, and his wife, Caroline Meyer, who had an interest in some real estate which was held by her as her separate property, executed and delivered to the plaintiff, Schneider, their three several promissory notes, one payable in one month, one in two months, and the other in three months after the date thereof, and each for the sum of two hundred dollars. The evidence shows, that these notes were each intended to cover the amount due by one of the judgments before stated, except interest and costs; that the object in executing these notes and delivering them to Schneider was to fix a time at which these judgments should be paid; but it was expressly agreed between the parties that the notes were not received in payment or discharge of the judgments, but that they were held as collateral thereto, and that if the notes were not paid when due, plaintiff should proceed under the judgments to collect the amounts due thereon.

The notes were not paid when due, and were delivered up by plaintiff to Meyer and his wife. The defendants, Stueck

and Hertz, the evidence shows, did not have anything to do with the contract in reference to these notes taken as collateral to the judgments, and never assented to their being delivered up to the makers.

After the notes were delivered up to Meyer and wife, a motion was filed on the part of all of the defendants for the purpose of having satisfaction entered of the judgment. It was alleged in the motion, that the judgment had been fully discharged and paid off, and that the plaintiff, although he had been requested so to do, had refused to enter satisfaction of the judgment, wherefore the court was asked to cause satisfaction to be entered, &c. The court heard the motion, and upon the facts before stated, sustained the motion as to the defendants, Jacob Stueck and Charles Julius Hertz, and ordered satisfaction of the judgment to be entered as to them.

The plaintiff filed a motion for a re-hearing, which being overruled, he appealed to General Term of said court. The court at General Term reversed the judgment rendered at Special Term, from which last judgment the defendants, Stueck and Hertz, appealed to this court.

The statute, under which this proceeding was had, provides, that, "If any person receiving satisfaction of a judgment or decree shall refuse, within a reasonable time after request of the party interested therein, to acknowledge satisfaction on the record, or cause the same to be done in the manner herein provided, the person so interested, on notice given, may apply to the court to have the same done, and the court may thereupon order the satisfaction to be entered by the clerk, with the like effect as if acknowledged as aforesaid," &c. It is clear to my mind, that the facts shown in this case by the evidence in the bill of exceptions, do not bring it within the provisions of the statute. There is no such satisfaction of the judgment shown as will bring the case within the remedy contemplated by the statute. If any of the defendants are released from the obligations of the judgment, they must be relieved under some other proceeding than the one here adopted.

It is, however, contended by the defendant, that if the provisions of the statute are not broad enough to cover the facts of this case, still he has a right to the relief he asks under the rules in equity which apply in such cases.

In the first place, I do not agree that a motion may be made under a special statute for a remedy therein provided, and that, under such motion, the court would give the party some other equitable relief, which was neither embraced in, or relied on by the motion. It is, or may be true, that courts having common law jurisdiction, may upon motion in analogy to the old writ of *audita querela* set aside or vacate judgments for irregularities in the proceedings by which one party has obtained an inequitable advantage of the other, by an abuse or misapplication of the process or other proceedings in the court, and it may be in some other cases, as was attempted in the case of *Wood & Oliver vs. Ellis*, (10 Mo., 383). But this is not that case. This case grows out of a transaction since the judgment was had, between the plaintiff and one of the defendants, by which it is contended, that the other two defendants are released in equity from further liability on the judgment. There is no pretense that the judgment has been actually satisfied or discharged as to the other defendant, and hence no satisfaction of the judgment could be entered under the motion. If the defendants have any remedy in such case it is certainly not by motion; but must be obtained by a bill for an injunction or other bill in equity as was done in the case of *Rice vs. Morton*, 19 Mo., 263.

The judgment of the court at General Term will be affirmed. Judge Wagner absent. The other judges concur.

---

Doering v. Saum, et al.

---

FREDERICK DOERING, Bespondent, *vs.* STEPHEN SAUM, *et al.*,  
Appellants.

1. *Practice, Supreme Court—Evidence, not weighed*—The Supreme Court will not weigh evidence in a cause to see if it was properly considered by the jury; although, if it were clearly shown that there was absolutely no evidence to uphold a verdict so as to plainly indicate that the verdict was the result of mistake, prejudice or corruption, the Supreme Court would not hesitate to reverse the judgment rendered on such a verdict. To induce such action the case must be a clear one.

*Appeal from St. Louis Circuit Court.*

T. G. C. Davis, for Appellant.

Geo. E. Smith, for Respondent.

VORIES, Judge, delivered the opinion of the court.

The petition in this case contained two counts, one founded on a promissory note, and the other founded on an account for interest due.

There is no question raised in this court, as to the issues tried on the second count; but the whole controversy in the case grows out of the defense set up by the defendant, Stephen Saum, to the note named in the first count. The note sued on was as follows:

St. Louis, March 1st, 1869.

Twelve months after date we promise to pay to the order of Frederick Doering one thousand dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of eight per cent. per annum."

This note was signed at the bottom by Nicholas Saum and Dieckmann, and the name of the defendant Stephen Saum was written across the back of the note.

The pleadings are prolix, but no question is made on the pleadings, and none is made in reference to any defense set up in the case except the defenses set up in the separate answer of Stephen Saum.

The defenses relied on by Stephen Saum are, first, that he did not execute the note sued on as maker of the note, but



that he only wrote his name on the note as an indorser for the accommodation of the other defendant's, and second, that the note was altered by the plaintiff in a material matter after defendant had indorsed the same, without the consent of said defendant, and that the note was therefore void as to him.

The issues were framed on this answer, and a trial was had before a jury and the issues found for the plaintiff. At the close of the evidence the court fully instructed the jury upon the issues to be tried, neither party objecting to any of the instructions, and no instructions were refused by the court. After the verdict was found the defendant filed a motion for a new trial on the ground that the jury had disregarded the instructions of the court, and had found their verdict against the evidence, and wholly without and in disregard of the evidence.

The Circuit Court at Special Term overruled this motion and the defendants appealed to General Term where the judgment was affirmed; from which last judgment the defendants appealed to this court.

No point is made in this court as to the first issue made in the answer; but it is insisted here that the jury found for the plaintiff on the second issue, not only against the weight of the evidence, but in direct opposition to all of the evidence in the case, and that the court therefore erred in overruling the defendant's motion for a new trial, and that the judgment ought to be reversed. This court has uniformly held that where there is a conflict in the evidence, the evidence will not be weighed here in order to ascertain whether the jury properly weighed the evidence or not; but if it were shown that there was absolutely no evidence to uphold a verdict so as to clearly indicate that the verdict was either the result of mistake, prejudice or corruption, this court would not hesitate to reverse the judgment rendered on such a verdict; but the case must be a clear one. In this case the issue was, whether the plaintiff had altered or procured to be altered the date of the note sued on after the defendant Stephen Saum had signed the same, without his consent. The plaintiff and defendants were the only witnesses in the case.

The plaintiff testified that the note was drawn at the store of Nicholas Saum and Henry Dieckman, in the absence of Stephen Saum, who resided about ten blocks from the place where the note was drawn. That as the note was first drawn it was dated as of the 4th of March, 1869, that the date was then changed by said Nicholas Saum, at said store house, to the 1st of March, 1869, in the presence of witnesses, and in the absence of said Stephen Saum, and that the name of Stephen Saum was not subscribed to the note until after it was so changed. Nicholas Saum testified that the note when written was taken to the house of Stephen Saum, and his name subscribed or written on it, that the date was at that time, either the 7th or 10th of March, 1869, but that after he returned to the store the date was changed to the 1st of March, and the note delivered to the plaintiff. H. Dieckman testified that after the note was signed by defendant Stephen, he heard some talk between his partner in the store about changing the date, after which the note was delivered to plaintiff, and he left, but that he did not see the note changed. Stephen Saum testified that the note was dated the 7th or the 10th of March, 1869, when he signed his name to it, but he further stated that he had just signed his name on the note as he had signed other notes for the same parties, and the note being written in English, he could not read it as he could not read English. This is the substance of the evidence; there are three witnesses on the part of the defendant, and but one on the part of the plaintiff. It is clearly a case of conflicting evidence. The jury and the trial court heard all of the evidence, they had an opportunity to see and observe the demeanor, and consistency of the witnesses, which all taken together, with all that is said, is better calculated to enable one to arrive at the truth than the mere words written in the bill of exceptions. As the jury has found the facts for the plaintiff, and the court has refused to set aside their verdict, we do not feel authorized to say they were wrong.

The judgment will be affirmed. The other judges concur.

---

Straat, Adm'r of Pemberthy v. Uhrig, et al.

---

JOHN N. STRAAT, Adm'r of WILMOT B. PEMBERTHY, Respondent, vs. STEPHEN UHRIG, *et al.*, Appellants.

1. *Trusts and trustees—Separate estate of married woman—Power of disposal and appointment—Failure to exercise—Rents and profits, etc.*—By the terms of a deed for the sole and separate use of a married woman, the trustee covenanted, \* \* \* upon the death of her husband to convey and dispose of the property and all proceeds thereof in such manner and to such persons as she might by her will or other writing appoint, and in default of such appointment to convey the premises to the children when they should become of age. *Held*, that the deed created a springing contingent trust in favor of the children, which might be defeated by a disposition of the property by her during her life, or by an appointment to take effect after her death. But where no appointment was made during her life, the trustee, and not her administrator, was the person then authorized to hold the title and collect the rents till the children became of age, and afterward to pay over to them their respective shares.

*Appeal from St. Louis Circuit Court.*

W. S. Richmond, for Appellants.

The court below erred in giving the instruction asked by the plaintiff, which declared the leasehold property to be the absolute property of William B. Pemberthy. (Churchill vs. Reamer, 8 Bush [Ky.], 256; Ralston vs. Waln, 44 Penn. St., 279; Prior vs. Quackenbush, 29 Ind., 475; Delony vs. Delony, 24 Ark., 7; Black vs. Cartmell, 10 B. Mon., 188; Turnman vs. White, 14 B. Mon., 560.)

The effect of this instruction, and the consequent judgment for the plaintiff, was to deprive the children of Samuel and Wilmot B. Pemberthy of all interest in the property conveyed by these deeds. The two deeds taken together constituted an equitable provision for the wife and children of Samuel Pemberthy, the legal title being in Branch for the purpose of executing the trust only. Conveyances of this nature must be construed liberally (Wms. Real Prop. [3 Am. Ed.], p. 152) and effect given to every part, if possible. (Flagg vs. Eames, 40 Vt., 16; Collins, Adm'r vs. Lavelle, 44 Vt., 230; Prior vs. Quackenbush, 29 Ind., 475; Goodyear vs. Cary, 4 Blatchf. 271.)

J. N. Straat, for Respondent.

---

Straat, Adm'r of Pemberthy v. Uhrig, et al.

---

I. As the deed of Gilson to Branch, in trust for Mrs. Pemberthy, gave to Mrs. Pemberthy an absolute power of disposal, without limitation or qualification, she took an absolute and unqualified estate in the property conveyed therein. (Ruby vs. Barnett, 12 Mo., 3; Jackson vs. Robins, 18 Johns., 537.)

II. This being the separate and absolute property of Mrs. Pemberthy, on her death her administrator is the proper party to take charge of it, collect the income arising therefrom, and administer the estate according to law.

ADAMS, Judge, delivered the opinion of the court.

This case originated before a justice of the peace and was taken by appeal to the Circuit Court, and a trial in the Circuit Court resulted in a judgment for the plaintiff, which was affirmed at General Term, and the defendant has brought the case here by appeal.

The action was for two month's rent, amounting to \$110 alleged to be due to the plaintiff, as administrator of the estate of Wilmot B. Pemberthy, who died intestate in 1870, leaving four children, one of whom was of age when the case was tried and the others minors under twenty-one years. The record does not show when the children will arrive at maturity.

The defendants were tenants of certain household property in the City of St. Louis, which was held by Joseph W. Branch in trust for the sole and separate use of the said Wilmot B. Pemberthy, wife of Samuel Pemberthy. The intestate died without making any disposition of the property by appointment or otherwise, and the only question is, whether the trustee in the deed of settlement, by which the property was secured to the separate use of Mrs. Pemberthy, or her administrator was entitled to receive the rents after her death.

The solution of this question depends upon the proper construction of the deed of settlement, which reads as follows:

"This deed, made and entered into this 11th day of May, 1867, by and between George Gilson, of the city of St. Louis,

---

Straat, Adm'r of Pemberthy v. Uhrig, et al.

---

county of St. Louis, in the State of Missouri, party of the first part, Joseph W. Branch, of the same place, party of the second part, and Wilmot B. Pemberthy, wife of Samuel Pemberthy, of the same place, party of the third part. Witnesseth : that the said party of the first part, in consideration of the sum of three thousand dollars, to him in hand paid by the said party of the third part, the receipt of which is hereby acknowledged, and the further sum of one dollar to him paid by the said party of the second part, the receipt of which is hereby also acknowledged, does, by these presents, grant, bargain, sell and assign unto the said party of the second part, the leasehold property and estate situated in the city of St. Louis and county of St. Louis, in the State of Missouri—[Here follows a description of the premises, which is a leasehold to run from May, 1866, to the 30th day of April, 1876.]—To have and to hold the same, with all the rights, privileges and appurtenances thereto belonging, or in any wise appertaining, unto him, the said party of the second part, his heirs and assigns, for and during the continuance of said lease, in trust, however, to and for the sole and separate use, benefit and behoof of the said Wilmot B. Pemberthy ; and the said Joseph W. Branch, party of the second part, hereby covenants and agrees to, and with the said Wilmot B. Pemberthy, that he will suffer and permit her, without let or molestation, to have, hold, use, occupy and enjoy the aforesaid premises, with all the rents, issues, profits and proceeds arising therefrom, whether from sale or lease, for her own sole use and benefit, separate and apart from her said husband and wholly free from his control and interference, debts and liabilities, courtesy and all other interests whatsoever ; and that he will at any and all times hereafter, at the request and direction of said Wilmot B. Pemberthy, expressed in writing, signed by her or by her authority, bargain, sell, mortgage, convey, lease, rent, convey by deed of trust for any purpose, or otherwise dispose of said premises or any part thereof, to do which, full power is hereby given, and will pay over the rents, profits, issues and proceeds thereof, to her, the said Wilmot B. Pemberthy, and that

he will, at the death of said Wilmot B. Pemberthy, convey and dispose of the said premises, or such part thereof as may then be held by him under this deed, and all profits and proceeds thereof in such manner, to such person or persons, and at such time or times as the said Wilmot B. Pemberthy shall, by her last will and testament or any other writing signed by her authority, direct or appoint; and in default of such appointment, that he will convey such premises to the children of Samuel Pemberthy and Wilmot B. Pemberthy, when they shall attain the age of twenty-one years."

[The remainder of the deed contains a power in Mrs. Pemberthy to appoint another trustee, and need not be recited here.]

This deed was duly executed and acknowledged by the grantor and Joseph W. Branch, the trustee. Mrs. Pemberthy died without making any appointment of the property or its proceeds, rents, &c., by will or otherwise.

The defendants paid the rents sued for to the trustee after receiving notice from the plaintiff not to pay the rents to any one but himself.

This deed is in the ordinary form of a deed of bargain and sale under the Statute of Uses, and is such as is generally adopted in family settlements. The consideration moved from the wife, and the object of the deed was no doubt to settle the property on her, to be at her absolute disposal during her lifetime, with power in her to dispose of the property by will or by any writing signed by her or by her authority, to be carried into effect by the trustee after her death.

By the terms of the deed there was a springing contingent trust created in favor of the children, which might be defeated by a disposition of the property by her during her life, or by an appointment to take effect after her death. As she made no such disposition or appointment, this contingent trust sprung up at her death and vested in the children; not, however, to be conveyed to them by the trustee till they became of age.



---

Straat, Adm'r of Pemberthy v. Uhrig, et al.

---

The manifest intention of the deed of settlement was to vest the absolute trust estate in the mother, with a springing contingent trust in favor of her children. The trustee is to hold the legal title and collect the rents, &c., till the children arrive at age, and then pay or convey to each one, as he or she arrives at age, their respective shares with the accumulated interest.

The trustee, therefore, after the death of Mrs. Pemberthy was entitled to receive the rents from the defendants and hold them for the benefit of the children.

Under this view, the judgment must be reversed and the cause remanded. Judge Wagner absent. The other judges concur.

—o—

JOHN N. STRAAT, Adm'r of WILMOT B. PEMBERTHY, Respondent, *vs.* STEPHEN UHRIG, *et al.*, Appellants.

1. Straat, Adm'r of Pemberthy *vs.* Uhrig, *ante* p. 482, affirmed.

*Appeal from St. Louis Circuit Court.*

*W. S. Richmond*, for Appellants.

*J. N. Straat*, *pro se.*

ADAMS, Judge, delivered the opinion of the court.

This was an action brought before a justice of the peace for two months' rent, which was taken by appeal to the Circuit Court and resulted in a judgment for plaintiff, and was affirmed at General Term, and brought to this court by appeal.

The facts of the case are precisely the same as the case between the same parties decided at this term, except that the rents sued for are for two other months.

The result is, that the judgment must be reversed and the cause remanded. Judge Wagner absent; the other judges concur.

L. A. HARTMAN *et al.*, Respondents, *vs.* GEORGE W. BERRY,  
*et al.*, Appellants.

1. *Mechanics' lien—Bond against liens—Liens filed by surety on bond—Estoppel—Counter-claim—Injunction.*—A. advanced money to B. to enable B. to improve certain land, taking a deed of trust on the land, and a bond from C., the contractor, with D. as surety, that the buildings to be erected would be delivered to B. free from mechanic's liens. E. afterwards purchased the property and took an assignment of the bond. D. subsequently filed a lien for materials delivered to C. for the builders. *Held*, that D. was not estopped by the bond from filing his lien; that if A. lost any part of his money by reason of such lien being filed, the damage so sustained might be set up as a counter-claim. *Seem*, that if D. was about to enforce a lien, which endangered A's. debt, A. might enjoin its collection till his debt was paid.

*Appeal from St. Louis Circuit Court.*

*Slayback & Haussler*, for Appellants.

*Bereman & Smith*, for Respondents.

1. It is no defense to my action upon your note for you to plead that you hold my covenant not to sue you upon said note, and therefore I ought not to have and maintain my action. (*Atwood vs. Lewis*, 6 Mo., 392; *Bircher vs. Payne*, 7 Mo., 462; *Bond vs. Worley*, 26 Mo., 253.)

ADAMS, Judge, delivered the opinion of the court.

This was an action under the mechanics' lien law, brought by the plaintiffs, as lumber men, for a balance due for lumber furnished the defendant, George W. Berry, contractor, under a contract by him with one Anna Griswald and her husband, L. M. Griswald, for building a row of eight houses in St. Louis. During the progress of the buildings the defendant, Humphreys, purchased the property under a deed of trust, which had been made by the Griswalds to secure a debt to one Maria E. Bates.

The petition is in the usual form. The defendant Berry made no defense, and judgment by default was rendered against him as contractor. The defendant, Humphreys, as owner of the property, filed an answer traversing all the material allegations of the petition. The answer then proceeds

---

Hartman, et al. v. Berry, et al.

---

to set up new matter in the following words: "And defendant, for a more full and perfect answer herein, avers the truth to be, that long prior to the time of his purchasing the premises in controversy, to-wit: On the 15th of September, 1871, and whilst said buildings were being erected, the plaintiffs herein, as sureties for defendant Berry, and in consideration that said Griswolds, the owners, would raise money for said Berry on said property, then and there undertook and agreed, that they and the said Berry would deliver to said Griswolds, when completed, all of said buildings in the petition described, free from all mechanics' liens and other indebtedness of whatever character, growing out of the erection of the same, or in any way appertaining thereto, and then and there made, executed and delivered to one Maria E. Bates a certain bond in the words and figures following, to-wit: "Know all men by these presents, we, George W. Berry, principal, and L. A. Hartman and W. Graham as surety, all of the City and County of St. Louis, and State of Missouri, are firmly bound unto Maria E. Bates, of the same City, County and State, in the just and full sum of ten thousand dollars. The following are the conditions of this bond: Geo. W. Berry having contracted to build eight two story brick dwelling houses on the east side of Twelfth street between Spring and Wright streets, in city block No. 1127, in City of St. Louis, State of Missouri, for Anna Griswald, for the sum of eleven thousand dollars, according to plans and specifications previously adopted and signed between said Berry and Griswald, in furtherance of which Maria E. Bates has loaned to said Anna Griswald the sum of six thousand dollars, secured by deeds of trust on said premises; three thousand dollars of said amount has been paid to her, and the remaining three thousand dollars is to be paid to the contractor as the work progresses on said buildings, in the following instalments, to-wit: When the cellars are excavated, and cellar walls are made, and joists laid thereon, one thousand dollars is to be paid; and when the first story is up and joists laid, one thousand dollars more is to be paid, and the remaining one thousand

---

Hartman, et al. v. Berry, et al.

---

dollars, when the buildings are entirely completed and finished, according to the plans and specifications heretofore adopted; and a copy of said plans and specifications are in the hands of said Berry. Now if the said Berry as principal, or said Hartman or Graham as sureties, shall deliver to said Griswald when completed, all of said buildings heretofore mentioned free from all mechanics' liens and other indebtedness of whatever character growing out of the construction of the same or in any way appertaining thereto, then this obligation to be null and void, otherwise to remain in full force and effect.

In testimony, whereof we have hereunto set our hands and seals.

Geo. W. Berry. [SEAL.]

L. A. Hartman. [SEAL.]

Wm. Graham. [SEAL.]

And defendant avers, that, upon the delivery of said bond, said Bates did loan the money specified in said agreement; that this defendant thereafter purchased said property and buildings of said Griswalds' trustee in an unfinished condition, and faithfully carried out the conditions of said contract, with defendant Berry, alluded to in said agreement on the part of said Griswalds to be performed, on the faith of such bond and undertaking of plaintiffs herein, that said buildings would be delivered free from all liens; and said bond and undertaking aforesaid was then and there by said Bates duly assigned to this defendant; and said defendant, relying on said covenant and agreement of said plaintiffs in said bond contained, that said Berry would deliver said houses to said Griswalds when completed free from all mechanics' liens and other indebtedness of whatever character, then and there paid to said Griswalds' trustee the purchase money for said property, and paid said Berry in full for completing said houses, and defendant says that by means of said acts of plaintiffs he was led to believe that plaintiffs would faithfully carry out their bonds and agreements, and protect said buildings from all liens, much less file one themselves; and he says

that by means of the premises, they are estopped from prosecuting any action against said premises, or this defendant as the assignee of said Griswalds' trustee and Bates, and ought not to be allowed to now maintain this action, which they had expressly bound themselves to hold said Bates and his assignees harmless from; and cannot in equity and conscience now be permitted to prosecute a lien against said buildings, which by their own acts they had led defendant to believe they would see delivered free of all liens and other indebtedness. Wherefore this defendant prays judgment for his costs."

The plaintiffs demurred to the new matter as above set forth in the answer of defendant Humphreys, upon the alleged ground that it did not constitute a defense to the action. This demurrer was sustained. The parties submitted the case for trial to the court, and the plaintiffs gave evidence conducing to prove their account contained in the lien, and that the lumber was supplied to Berry under a contract with him as original contractor with the Griswalds to build the houses referred to; that the items of 20th of February, 1872, were gotten after the defendant Humphreys had become the owner. But those items were sold and delivered to defendant Berry on that day, and were used on the buildings under the same running account as the other materials. The defendant Humphreys objected, as the bill of exceptions shows, to all evidence in regard to matters occurring prior to October, 1871. This objection was overruled, and defendant excepted. He also excepted to the introduction of the lien in evidence, upon the ground that the last item in the account was delivered and sold more than four months prior to the date of filing the lien. The date of filing the lien was the 19th of June, 1872.

The defendant offered in evidence the deed of trust, and the deed by the trustee to him as purchaser of the premises, and the bond which had been assigned to him by Bates; all of which were objected to and ruled out, and the defendant excepted.

The defendant gave evidence tending to show, that the items in plaintiffs' account of February 20, 1872, were delivered after he became the purchaser of the buildings, and used in building fences on the premises; and evidence tending to show, that defendant, after his purchase, made a contract with Berry to finish the houses for something over \$5000, and had fully paid Berry for the work done after he became the purchaser. The evidence was conflicting as to whether the plaintiffs had notice of the sale to defendant Humphreys before the delivery of the items of 20th of February, 1872. The court gave declarations of law, but as there are no special objections to them, and, as they seem fairly to present the case, it is unnecessary to recite them.

1. The main point raised by the record is, whether the demurrer to the new matter set up in the defendant's answer, was properly sustained. From the face and tenor of the bond given to Bates, which is copied in the answer, it is manifest that its only purpose was to secure her in the payment of the money loaned to Griswalds, for which the deed of trust was executed. The object was, that the deed of trust might not be swept away by liens filed under the mechanics' lien law. There is no allegation in the answer, that Bates was injured, or if injured to what extent. The bond itself would not operate as a bar or estoppel against filing liens. If Bates lost her money, or any part thereof, by reason of such liens being filed, the damage so sustained might have been set up as a counter-claim, or if her lien was about to be enforced by the sureties in the bond, which endangered her debt, she might perhaps enjoin the collection till her debt was satisfied. Under this view, in my judgment, there was no error in sustaining the demurrer. And for the same reason the court properly excluded as evidence, the bond assigned to him by Bates, and the deeds under which the defendant became the owner of the property. As the demurrer had been sustained, there was nothing in the answer to justify the admission of such evidence; besides there was no offer to prove that Bates had suffered any damage or loss in the collection of her debt.



---

State ex rel. Wilson, et al. v. Taylor, et al.

---

2. Whether the items in plaintiffs' lien of the 20th of February, were delivered under the original contract made by him with Berry or not, was fairly submitted to the court, and the evidence on that point was sufficient to sustain the finding, which was for the plaintiffs. Upon the whole record there seems to be nothing to justify us in disturbing the judgment.

Judgment affirmed, Judge Wagner absent. The other judges concur.

—o—

STATE OF MISSOURI, *ex rel*, and to use of HENRY WILSON, *et al.*,  
Appellants, *vs.* PHILIP C. TAYLOR, *et al.*, Respondents.

1. *Execution creditor—Appropriation of money in hands of sheriff to—Levy upon, under writ against execution creditor.*—A sheriff who has received money on an execution, cannot before the same is paid over or appropriated, attach or levy upon the money so held, on a writ issued against the execution creditor. If in such case the sheriff should make the proper appropriation, his act in so doing might be upheld. But he is not bound to appropriate the money but may return his executions and money into court for its disposition of the same.

*Appeal from St. Louis Circuit Court.*

Thomas S. Espy, for Appellants.

VORIES, Judge, delivered the opinion of the court.

This action was brought on the official bond given by defendant Taylor, as sheriff of St. Louis County, the other defendants being the sureties on the bond. The facts appearing in the record necessary to a proper understanding of the question raised by the appellant for consideration by this court are substantially as follows:

On the 13th of May, 1871, there was a special execution placed in hands of defendant Taylor, as sheriff of St. Louis County, for collection, which execution was in favor of one Augustine M. Daly and against Owen V. Timon. This

execution was for a sum of over two thousand dollars. The greater part of said sum was specially appropriated by order of the court rendering the judgment on which the execution was issued, to the payment of specific liens therein named.

Shortly after this execution in favor of Daly was delivered to Taylor, as sheriff, for collection, and before it was collected, four other executions were placed in the hands of said sheriff for collection which were in favor of different parties, but all were issued against the property of said Augustine M. Daly, one of these last named executions being in favor of Henry and Oliver Wilson, the relators in this action, and being for the collection of the sum of about two hundred and seventy-five dollars; the other three executions against Daly being for different sums larger in amount than the execution of the relators. All of the executions were returnable to the June Term of the court for the year 1871. Previous to the return day of the executions the sheriff collected the execution in favor of Daly and against Timon, and after paying off the different amounts specially appropriated and directed by the court, there was remaining in the hands of the sheriff, of the amount collected on the execution in favor of Daly, the sum of five hundred and fifty-five dollars. At the return day of the execution, it being the June Term of the court for the year 1871, the defendant Taylor returned all of the executions into court. In his return on the execution in favor of Daly, it was stated that the execution was satisfied and it was shown how the different amounts named in the execution as specific appropriations of the amounts collected thereon had been paid, and then it was stated in the return that he held in his hands the four other executions, one of which was in favor of the relators, all of which were unsatisfied and so returned, and that the sheriff then had and returned to the court the sum of \$555.00 collected on the execution in favor of Daly, subject to the order of the court.

On each of the four executions against Daly, the sheriff made returns stating the facts, that he held the four executions unsatisfied against Daly, and that he had in his hands the said

---

State ex rel. Wilson, et al. v. Taylor, et al.

---

sum collected on the execution in favor of Daly, which was subject to the order of the court, etc. Shortly after the return of all these executions, the relators procured an *alias* execution to be issued on the judgment in their favor and delivered it to defendant Taylor, as sheriff, with directions to seize or levy on the amount in his hands collected on the execution in favor of Daly as aforesaid.

The sheriff failed to levy on the money in his hands collected on the Daly execution, but at the October Term of the court for the year 1871 returned the *alias* execution with the indorsement thereon that there was no property or goods found in the county belonging to Daly on which to levy and make the money. This last return is charged by the relators to be a false return, and the falsity of the return is assigned in the petition as a breach of the bond of the sheriff, and is the grounds of this action.

The action was tried in the Circuit Court without a jury. At the close of the evidence the plaintiff asked the court to declare the law to be as follows: "If the court sitting as a jury find from the evidence that on the tenth day of June, 1871, plaintiffs placed in hands of defendant Taylor, as sheriff, an *alias* execution in their favor and against A. M. Daly, and it also finds that on the said day, 10th day of June, 1871, said Taylor had in his possession the sum of five hundred and fifty-five 40-100 dollars in currency, commonly called greenbacks, issued by the Government of the United States, the property of said Daly, and that said plaintiffs then directed said sheriff to levy upon said currency or greenbacks and make the money on their execution, and said Taylor refused or neglected to comply with said instructions of plaintiffs, and afterwards returned said *alias* execution *nulla bona*, then his said return is false and the judgment should be for the plaintiffs for the amount of their said execution with interest and costs."

This declaration of law was refused by the court and the plaintiff excepted.

The court then, at the instance of the defendants, declared the law to be, that "Under the pleadings and evidence the plaintiffs are not entitled to recover."

To this declaration of law the plaintiffs excepted. The court then rendered a judgment in favor of defendants, after which plaintiffs filed a motion for a new trial, which being overruled by the court, the plaintiffs again excepted, and appealed to general term of the Circuit Court where the judgment rendered at special term was affirmed; from which last judgment the plaintiffs have appealed to this court.

The record of this case presents only one point for consideration in this court. It is true that there was some question raised on the trial as to the admissibility of certain executions and the returns made thereon in evidence on the part of the defendants; but if the money or United States Treasury notes in the hands of the sheriff were not subject to be levied on as the property or effects of Daly, then the admission of the executions in evidence could do the plaintiff no harm; and on the other hand, if the bills or greenbacks were subject to be levied on and sold by virtue of the *alias* execution in the hands of the sheriff, then the judgment should be reversed whether the executions were properly admitted in evidence or not. It is insisted by the plaintiffs that the Circuit Court erred in refusing to declare the law as asked for by them, and that the judgment should therefore have been reversed.

The declaration of law asked for may be, in the abstract, right. There is no doubt but that bills or greenbacks issued by the Government are subject to execution, and that if the sheriff at any time had in his power, while he had the *alias* execution of the relators in his hands for collection, any such property or effects of the defendant in the execution, nothing appearing to the contrary, it would have been the duty of the sheriff to have levied on such effects and made the money due on the execution of the relators; but that is not this case. There is no question but such property is ordinarily subject to execution, but the question is whether the declaration of law was right as applicable to the facts of this case?

The question in this case is, whether the sheriff who has received money on an execution, can, before the same is appropriated or paid over, receive a writ against the execution creditor, and on such writ attach or levy on the money so in his hands? In the present case the money was collected on the execution in favor of Daly; the sheriff returned the writ, as well as three executions in his hands against the property of Daly, to the court with the facts stated in the returns to the several writs, and stating in the returns that the money was held by the officer to be disposed of by order of the court. The parties were presumed to be in court and if the attention of the court had been called to the matter, it would doubtless have made an order disposing of the money. But until this was done there could be no title in Daly to any specific money which could be levied on by the sheriff. The money was in the custody of the law and would so remain until disposed of by the court. If in such case the sheriff should make a proper appropriation of the money, his act in so doing might be upheld, but he was not bound to appropriate the money but might return his executions and money to the court for its disposition of the same. (Thompson vs. Brown, 17 Pick., 462; Reddick vs. Smith, 3 Scam., 451; *Ex parte Fearle & Lewis*, 13 Mo., 467; Drake Attach., § 251, and cases therein cited.)

The court properly refused the instruction or declaration of law asked for by the plaintiffs, and properly rendered judgment on the evidence in favor of the defendants, and the judgment will therefore be affirmed. The other judges concur.

---

Haskell & Co. v. Farrar, et al.

---

HASKELL & Co., Respondents, vs. JAMES S. FARRAR, et al.,  
Appellants.

1. *Administration—Bond—Sureties—Additional—Release of former.*—The security contemplated by the 41st section of the Administration Law, is additional to that previously given, and does not have the effect of releasing the former sureties. The 39th section applies to an entirely different case, and does not apply to that contemplated by the 41st section. (State *ex rel.*, Glenn vs. Wright's Adm., 53 Mo., 479, affirmed.)

*Appeal from St. Louis Circuit Court.*

H. A. Clover and S. Simmons, for Appellants.

Krum & Patrick, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

From the record it appears that Thos. J. Daily was appointed administrator of the estate of James Roddy, deceased, by the Probate Court of St. Louis County, and on the 24th day of December, 1866, he executed his bond in the sum of \$100,000, with the defendant, Farrar, as one of his sureties.

At a subsequent term of the Probate Court, the administrator, Daily, was required to give an additional bond in the sum of \$50,000, which order he complied with on the 11th day of January, 1867, and the new additional bond was made with other sureties. Both bonds were approved. Afterwards, in due course of administration, the Probate Court made an order for the payment of ninety per cent. of the demands allowed to the creditors. The administrator failed to comply with this order. The plaintiff, whose demand had been allowed, then instituted this proceeding by motion, to obtain judgment against the administrator and his sureties on the original bond, and judgment was rendered against them, upon which an execution was awarded. An appeal was taken to the Circuit Court, where the judgment of the Probate court was affirmed, and the defendant has now brought the case here.

The only question in the case is, whether the taking of the additional bond had the effect of releasing the sureties on the original bond. The statute in regard to executors and administrators, (Wagn. Stat., p. 75, 76) makes different pro-



visions in regard to requiring new bonds to be given, and they are dissimilar in their effect and operation. By the 36th section, any heir, legatee, creditor or other person interested in any estate, may file an affidavit, stating that he has reason to believe that the surety in the bond is insolvent, or that the principal is insolvent or is wasting the estate, and it is then made the duty of the court, on notice given, to examine the complaint. The 37th section provides that the same proceedings may be had on behalf of a surety in the bond, upon showing that his co-surety has or is likely to become insolvent, or that the principal has or is likely to become insolvent, or is wasting the estate. Section 38 declares, that if the court shall find the complaint mentioned in either of the preceding sections, to be just, it shall order another bond and sufficient security to be given. The 39th section then declares the effect of such additional bond, and says, that when it is given and approved, it shall discharge the former sureties from any liability arising from any misconduct of the principal, after filing the same, and such former sureties shall only be liable for such misconduct as happened prior to the giving of such new bond. If the new bond is not given within ten days after the making of the order for that purpose, then by section 40. the letters of administration from thenceforth shall be deemed revoked. But by the 41st section, it is provided that it shall be the duty of the court, whenever it shall appear necessary and proper, to order an executor or administrator to give other and further security, first giving such executor or administrator at least five days' notice of such intended order.

It will be observed that all the sections preceding section 40, apply to cases where either the co-surety or some person interested in the estate, institutes a proceeding on the ground that the sureties or the principal have, or are likely to, become insolvent, or that the assets of the estate are being wasted or mismanaged. The 41st section, however, proceeds upon an entirely different reason. There it is left to the discretion of the court, upon its own motion, to order an executor or administrator to give other and further security, when it

shall appear necessary and proper. The provision of section 39, by which the former sureties are released after the bond is filed, has no application. When the court acts of its own motion, it is not because the estate is being wasted, or any of the former bondsmen are insolvent, but it is because the bond is deemed to be an inadequate security, and therefore, other and further security becomes necessary. The last bond does not supersede the former, but is cumulative and additional to it. This question was carefully examined in the case of State, *ex rel.*, Glenn vs. Wright's Adm'r, *et al.*, (53 Mo., 474) and the above conclusion arrived at. It must now be considered settled, and no longer open to discussion. (See also, State to use, etc. vs. Drury, 36 Mo., 281.) As the court, in this case, acted upon its own motion, the sureties in both bonds are liable for the default of the administrator. Whatever their respective rights may be, as regards contribution between themselves, is a matter not necessary to be now considered.

The judgment should be affirmed; the other judges concur.



PALMER & SCOVILLE, Respondents, *vs.* JAMES S. FARRAR, *et al.*, Appellants.

1. Haskell vs. Farrar, *ante* p. 497, affirmed.

*Appeal from St. Louis Circuit Court.*

Samuel Simmons and H. A. Clover, for Appellants.

John N. Straat, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

This case was submitted in connection with the case of Haskell & Co. vs. Farrar, *et al.*, and the proposition of law involved is identically the same.

For the reasons given in that case, the judgment must be affirmed; the other judges concur.

HENRY PRICE, Appellant, *vs.* MARY ROETZELL, Adm'r of  
HENRY ROETZELL, deceased, Respondent.

1. *Landlord and tenant—Rent—Crops—Lien—Attachment—Injunction.*—Under the statute which provides that every landlord shall have a lien upon the crop grown on the demised premises in any year, for the rent that shall accrue for such year, (1 Wagn. Stat., 880, § 18,) an attachment as provided for in the 26th section of the same act, (Wagn. Stat., 881-2,) is not necessary to enforce the lien. The court would enforce the lien without such process and would enjoin the removal or disposition of the crops while the lien continued. An attachment is proper only where there is no lien.

*Appeal from St. Louis Circuit Court.*

H. B. Lighthizer, for Appellant.

E. C. Kehr, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This was a petition to enforce a landlord's lien for rent. The petition set out the facts to be, that the plaintiff had leased to one Roetzell, a farm in St. Louis County for three years, at a rent of \$500 a year, to be paid on the 1st of Oct. of each year; that the lessee entered upon the premises under the lease and continued in possession until his death, which occurred in the latter part of Sept. 1871, a few days prior to the day when the first year's rent became due; that the rent was demanded of defendant, Mary or Margaret Roetzel, who was administratrix of the estate, but it was not paid; that during the year certain crops of corn and oats were raised on the farm; that these crops were in possession of defendant as administratrix; that the estate was insolvent and the defendant also; that the crops mentioned were of a perishable character and going to waste, and liable to deteriorate in value, unless immediately sold, and that unless summary process was granted for the enforcement of his lien as landlord on said crops, (under sec. 18, Wagn. Stat., 880) there was danger of his losing his rent. Wherefore plaintiff prayed the court for a judgment of lien against said crop, for the said sum of \$500, and that said crops may be seized under attachment by the sheriff and sold, and the proceeds

held subject to the further order of this court, and for such other and further relief as to the court may seem just, etc.

To this petition there is annexed an affidavit of said Price, that the amount of rent claimed is correctly stated, and that he has good reason to believe that the defendant intends to remove her property, to-wit: the crops belonging to the said estate, from the leased premises, and that unless an attachment be issued against said crops he will lose his rent.

Upon this petition and affidavit an attachment issued, and the sheriff returned that he had taken into custody the corn and oats raised on the place, and had furnished the defendant with a copy of the petition; that the property first seized was claimed by defendant and a bond given, and certain other property attached.

In December, 1871, the defendant pleaded that it was not true that she intended to remove her property or the property of her deceased husband, and upon this plea there was a jury trial and the verdict was for defendant. Upon the trial it appeared that the crops seized under the attachment were grown on the place rented, that the rent was due; that defendant, after her husband's death, removed from the place and sent to market a load of corn for the purpose of supplying herself with the necessities of life.

After this trial the court gave a judgment for the plaintiff for \$531.00 to be levied on the property of the deceased; and as it appeared that the suit was commenced within one year from the date of the letters of administration, the costs were adjudged against the plaintiff.

A motion was then made that the sheriff be directed to hold the proceeds of the sale of the crops seized, subject to the enforcement of the plaintiff's lien thereon, and restraining him from paying them over to defendant. This motion was overruled.

Our law provides that "every landlord shall have a lien upon the crop grown on the demised premises in any year for the rent that shall accrue for such year, and such lien shall continue for eight months after such rent shall become due and payable, and no longer."

This suit was to enforce such lien, and in aid of it an attachment was obtained—though absolutely unnecessary—since the court could have enjoined any sale of the crops by the administratrix, and had the right to order their sale as perishable property by the sheriff, and their proceeds held subject to the result of the suit.

It is obvious that the attachment provided for in the 26th section of the landlord and tenant law has no application to such a case as this petition presented, and was improperly obtained. An attachment, such as the section authorizes, is not to enforce a lien against the crops raised during the year, but to secure the rent from property on the place on which there is no lien. Nothing of this kind was asked in the petition. The whole object was to enforce the lien on crops grown on the place, and, as was asserted, going to waste. The affidavit, therefore, appended to the petition, and the plea denying its truth made an issue wholly foreign to the merits of the case. The decision of this issue being against the plaintiff, the court gave the plaintiff a general judgment for his rent, but taxed the costs against him. This judgment would, of course, share the fate of all other claims against the estate.

The main point in the case, which was that the plaintiff had a lien on certain crops raised on the place and asked its enforcement, was not tried.

From the judgment of the court concerning costs, it might be inferred that the court was of opinion that this lien was lost by the death of the tenant, and that the claim for rent must go into the Probate Court to share the fate of other claims against the estate, and this seems to be confirmed by the refusal of the court to direct the proceeds of the sale made by the sheriff to be paid over to plaintiff.

The judgment will be reversed and the cause remanded. The other judges concur.

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

ST. LOUIS MUTUAL LIFE INS. CO., Appellant, *vs.* THE BOARD OF ASSESSORS OF ST. LOUIS COUNTY, *et al.*, Respondents.

1. *St. Louis Circuit Court—Writ of error to General Term.*—Under the statute and the rules of court provided in pursuance thereof, a writ of error will lie from a final judgment of the Circuit Court of St. Louis County in special term, to the general term of that court.
2. *Insurance, life—Capital Stock—Taxation, what property subject to.*—Section 40 of the act touching life insurance, (Wagn. Stat., 752) provides that the payment of certain fees by the respective companies, shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid up capital stock the same as other property in the county, for county and municipal purposes." *Held*, that this provision, properly construed, did not prevent the taxation of other property owned by the companies, over and above the par value of their capital stock. Such is not double taxation. But the non-taxation of such property would amount to an exemption, in violation of the State Constitution. (See *Life Association of America vs. Board of Assessors, etc.*, 49 Mo., 512.)
3. *Revenue—Double taxation not necessarily void.*—In levying taxes on property, the same value is sometimes unavoidably taxed twice; but this fact does not, of itself, render the tax illegal and void.

*Appeal from St. Louis Circuit Court.*

*Cline Jamison & Day*, for Appellant.

I. There is nothing in rule 57 that authorizes the issuing of a writ of error—the rule relates merely to the filing of briefs.

II. If writs of error are allowed in cases of this character, they might lie for an indefinite time after judgment in the Circuit Court, and then might be taken up to the General Term, and after being disposed of there, plaintiff in error would still have three years more within which to go to the Supreme Court.

III. A writ of error will not lie to bring up any matter from an inferior court where an appeal is provided for. In such case the party must take his appeal in the manner provided for by the statute. (*Matson vs. Dickerson*, 3 Mo., 339; *North Mo. R. R. Co. vs. Parks*, 34 Mo., 159.)

IV. The assessment of the "loans, securities and bonds" amounted to a double assessment of the property of the company, and so far forth was it illegal and void. All of the



---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

provisions of the law relating to the assessment of the property of corporations having a capital stock, contemplate that assessments shall be made on the capital stock, and on that alone. (Wagn. Stat., 752, § 40; *Id.* 1169, §§ 19, 23, 24, 25; *Id.* 1188, §§ 28, 29; St. Louis Mut. L. Ins. Co. vs. Charles, 47 Mo., 462; State vs. Han. & St. J. R. R. Co., 37 Mo., 265.)

So far as the tax is a double one, it is illegal, not being authorized by the legislature, and is, in fact, impliedly, if not expressly, prohibited by the provision of the bill of rights, wherein it is declared that property shall be taxed in proportion to its value. The personal property of a corporation and its capital stock cannot be taxed at the same time. (Tax Cases, 12 Gill. & Johns, 117; Gordon's Ex'r vs. Mayor of Baltimore, 5 Gill., 231; State vs. Tunis, 3 Zab., 546.)

*Thomas C. Reynolds*, for Respondents.

I. The St. Louis Circuit Court can review, by writ of error, in General Term, decisions made at Special Term. In rule 57, (p. 20) in force when this suit was pending before it, "a writ of error" is expressly named. But this court will not interfere with a Circuit Court's construction of its own rules and practice, except in an extreme case. (Funkhouser vs. How, 18 Mo., 49.)

By § 15 of Art. VI of the Constitution, the judges of the St. Louis Circuit Court are explicitly constituted "a court in bank, to decide questions of law, and correct errors occurring in trials." Of course this included the power to issue the old common law writ of error. Even had the legislature the right to regulate that constitutional power of the St. Louis Circuit Court, it has not done so except to confirm it. Section 14 of the act of Dec. 19 1865, to provide for the organization of the St. Louis Circuit Court, &c., (Gen. Stat., 1865, p. 889) not substantially changed by act of 1869 (pp. 16, 17), recognizes the amplest power of the court to make its own rules and regulate the practice under them.

II. The question of legality of the assessment in this case was decided in Life Association vs. Board of Assessors, &c.,

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

(49 Mo., 512.) The assessment was not void on the ground that it subjected the same property to double taxation. The State taxes the holder of a note, and also the property of the maker, although the value of the former depends on the latter, or it may be valueless because the maker's property is mortgaged to its full value. So, also, stock may be valued and taxed at its value, and also the corporation property, on the net value on which the value of the stock depends. A corporation may own millions of taxable property, and yet its contingent liabilities be so great that its stock becomes utterly valueless. Shall the former therefore escape taxation?

VORIES, Judge, delivered the opinion of the court.

The plaintiff filed in the St. Louis Circuit Court a petition for a writ of *certiorari* against the defendants, in which it was charged, in substance, that it was a corporation duly organized for the purpose of making assurance upon the lives of individuals, and every assurance connected with the business of Life Insurance Companies; that by virtue of an act entitled "An act for the incorporation and regulation of Life Insurance Companies," approved March 10, 1869, it was provided that every company doing said business in this State shall pay to the Superintendent of the Insurance Department, certain fees and sums of money, which shall be in lieu of all taxes, fees and licenses whatever, collected for the benefit of the State, and should further be in lieu of all fees or taxes whatsoever, except that said companies might be taxed upon their paid up capital stock, in the same manner as other property in the county, for county and municipal purposes.

The petition avers that the plaintiff had paid all of the fees required by the law, and that the plaintiff had a paid up capital of one hundred thousand dollars, and that by the law it was only liable to pay the fees provided for, and the taxes assessed on the paid up capital stock; that the board of assessors had assessed a tax for the year 1870, not only on said capital stock, but also on personal property belonging to the plaintiff, of the value of \$1,150,000, which is described in

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

the assessment as "loans, securities or bonds," which said assessment is charged to be illegal; that plaintiff duly appealed from said assessment, and had asked defendant sitting as a board of appeals, by virtue of the provisions of the statute, to correct and adjust said assessment, and strike out the assessment on said "loans, securities or bonds," from the book of assessments, which said board of appeals refused to do; and avers that a warrant will be issued to the collector of St. Louis county, for the collection of the same, and irreparable damage done the plaintiff. Wherefore a writ of *certiorari* is prayed, &c., and that said assessment be annulled and set aside, &c. The record sent up with the return of the defendants to the writ was as follows:

"Appeal No. 217." "To the Court of Appeals of St. Louis county, District No. 3."

"St. Louis County, Mo., May 14, 1870."

"I hereby appeal from the present assessment upon property listed in the name of St. Louis Mutual Life Insurance Co., and described as follows: 'Loans, securities or bonds \$1,150,000.' The reasons for making this appeal are the following: That the said loans, securities or bonds belonging to the St. Louis Mutual Life Insurance Company, designated in said assessment, as of the value of \$1,150,000, and which are assessed or listed against said Company, are improperly, wrongfully and illegally assessed as aforesaid against said Company, inasmuch as by section 40, and other sections of an act entitled "an act for the incorporation and regulation of Life Insurance Companies," enacted by the General Assembly of the State of Missouri, approved March 10, 1869, said Company is made liable for the payment of certain fees in said section 10 mentioned, which by said act is made in lieu of all taxes or fees against said Company, except that said Company may be taxed upon its paid up capital stock in the same manner as other property in the county, for county and municipal purposes, and said Company has already, and separately, or in a separate item from the said "loan, securities or bonds," been assessed for its paid up capital stock." "Second, be-

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

cause the said assessment on the said "loans, securities or bonds," amounts to a double assessment against said Company, the said paid up stock of said Company, being represented in and comprehended in said loans, securities or bonds."

The record further shows, that the points made by the plaintiff before said board of appeals were overruled, and disallowed.

The case was heard in the St. Louis Circuit Court, upon the return of the writ of *certiorari*, and the court held said taxes to be wrongfully and illegally assessed, and declared the same to be of no effect, and declared the same to be reversed and in all things made void.

The defendants filed a motion for a new trial, which being overruled, they excepted and appealed to the General Term of the St. Louis Circuit Court. This appeal was dismissed on the motion of the plaintiff on the ground that the appeal had not been taken and the bill of exceptions filed in the time required by the rules of the court.

The defendant then moved the court at General Term for a writ of error to the Special Term to send up the record and proceedings in that court to the General Term, on the ground that manifest error appeared on the record in the cause. This motion was sustained and the record sent up to General Term by virtue of said writ of error.

The plaintiff afterwards appeared in the court at General Term, and moved the court to dismiss the cause for the reason that there was no law nor rule of court authorizing a cause to be removed from Special to General Term by writ of error, after final judgment in Special Term. This motion being overruled by the court, the plaintiff excepted.

The court then, upon a hearing and consideration of the cause, reversed the judgment rendered at Special Term and remanded the case. The plaintiff appealed to this court.

It is insisted by the plaintiff that the Circuit Court in General Term erred in overruling the motion filed by plaintiff to dismiss the cause, on the ground that a writ of error would not lie, or could not be issued by the General Term of the St.

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

Louis Circuit Court upon a final judgment rendered at Special Term.

By the 15th section of the 6th article of the constitution it is provided that "from and after the first day of January, one thousand eight hundred and sixty-six, the Circuit Court of the county of St. Louis, shall be composed of three judges, each of whom shall try causes separately, and all, or a majority of whom, shall constitute a court in bank to decide questions of law, and to correct errors occurring on trials; and from and after that day there shall not be in said county any other court of record having civil jurisdiction, except a Probate Court and a County Court." The number of judges constituting said court has since been increased to five.

By the 9th section of an act of the General Assembly of this State for the re-organization of the St. Louis Circuit Court, it is provided that "the said Circuit Court, after the day aforesaid, shall hold General and Special Terms as the business thereof may require. A General Term is when the court sits as a court in bank," &c. By the 11th section of said act it is provided that "a Special Term is where only one judge presides, and is for the trial of causes, and the transaction of all other business not specified in the next preceding section, and each judge at Special Term, with that exception, shall have, and exercise, all the powers and functions which he might have and exercise if he were the sole judge of the court."

The 10th section as amended by the act of February 25, 1869, provides that "at General Term the said Circuit Court shall hear and determine points of law reserved at Special Term, and all appeals taken from any final judgment or decree rendered, or order made at Special Term; and when an appeal is taken from a final judgment or decree rendered at Special Term, such appeal shall operate as a *supersedeas* unless the court at Special Term shall otherwise order; in which case the judge may grant a stay of execution, pending such appeal, in like manner and on the same terms as provided for by law in cases of appeal from final judgment of the General Term to the Supreme Court.

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et. al.

---

Section 14 of said act as amended by the act of 1869, provides that a judgment, or decree or order made at Special Term may be reversed, vacated or modified at General Term, for errors appearing in the record at Special Term, or presented by exceptions taken thereat, &c. And it is further provided by said section, that "said court shall prescribe by rule the manner in which judgments, orders and decrees rendered or made at Special Term, shall be brought up to General Term for review, and remanded thence to Special Term. And in addition to the ordinary power of making rules, conferred by general law, the court may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein."

Under the provisions of this statute the said court at General Term made a set of rules, the eleventh of which provides, that "from all judgments and decrees rendered, or orders made at "Special Term" any party aggrieved, if he desires to apply to the General Term to have the same vacated, reversed or modified, shall within five days (if the term shall so long last, if not then before the end of the term) after rendition of such judgment or decree, or the making of such order, pray for an appeal to said General Term, which shall be allowed; and if the errors complained of do not appear in the record, then the same shall be preserved by exceptions taken to such Special Term."

There is no rule providing specially for a writ of error, or for any cause being removed by writ of error from the Special to the General Term, but it is provided by the 57th rule adopted by said court at General Term, that "the appellant, or plaintiff in error, shall, before the case is called for hearing in General Term, file a concise statement of the material facts of the case, and the points of law, together with a citation of authorities upon which he relies. If this rule be not complied with, the court may either affirm the decision of the court at Special Term, or dismiss the appeal or writ of error at its option."



Now it is insisted by the plaintiff, that a writ of error cannot lawfully be issued to bring up any matter from an inferior court where an appeal is provided for; that in such case a party must take his appeal in the manner provided for by the law, or in the present case by the rules of the court.

In the case of *North Missouri Railroad vs. Parks* (34 Mo., 159), it is held, that a writ of error will not lie to a court vested only with a special jurisdiction. The learned judge delivering the opinion of the court, uses this language: "It is well settled by authority in this country, that in the absence of any statutory permission, the writ of error will not lie to a court vested with special jurisdiction, and which does not proceed according to the forms of the common law."

Neither the County or Probate Courts of this State possess common law jurisdiction, though declared by statute to be courts of record. They are courts of special jurisdiction, with powers defined and limited by statute. It is clear then, that a writ of error does not lie to them unless authorized by statute. This is doubtless the general rule, but the St. Louis Circuit Court is not a court of special jurisdiction. It has common law powers and can exercise common law jurisdiction. The power is given to the St. Louis Circuit Court at General Term to prescribe by rules, the manner in which judgments rendered at Special Term shall be brought up to General Term for review. The court, in conformity to the power given it, provided by rule the manner in which an appeal could be taken; and evidently believing that a writ of error was a writ of right, which required no special authority from it to authorize its issue, in rule 57 before quoted recognized and provided for such writs by providing that plaintiff in error should file statements, &c., and that if such statement &c., were not filed, the writ of error might be dismissed, &c. This rule clearly recognizes the right in a party to sue out a writ of error and bring up a case from Special Term by that process, and as the court making these rules has construed the rules made by itself, and can better understand their intention and objects than this court, we will not interfere with their decision on that subject.

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

The next question presented in this court is, as to the correctness of the decision of the Circuit Court at General Term, in reversing the judgment rendered at Special Term.

The ground, or cause, relied on by the plaintiff in his petition for a *certiorari*, and in his appeal before the board of assessors upon its appeal from the assessment, was, that plaintiff was a Life Insurance Company, chartered by the laws of this State, having a paid up capital stock of one hundred thousand dollars; that therefore, it could only be taxed on its capital stock, and the assessment of one million one hundred and fifty thousand dollars, made on its loans, securities and bonds, was illegal and void; that it was not liable for any further taxation than the fees paid by it as provided for in section 40, of the Insurance law, referred to in its petition, and a tax on its capital stock; and it was also charged that the taxation levied on its bonds, &c., would amount to a double taxation.

There is no pretense that the plaintiff did not own the bonds and other securities taxed, or they were estimated at a value over their true cash value.

It is not shown by the records that the plaintiff had been taxed on its capital stock, but it is so charged in the petition for a *certiorari* and nowhere denied, and the Special Term having found for the plaintiff, it is fair to presume that the capital stock had been assessed. The question presented in this case is, whether any tax can be assessed against a life insurance company having a capital stock, under the laws of this State, upon property owned by such company in addition to a tax which is levied on its capital stock? The law, under which it is claimed in this case that the property is not taxable, is the same relied on in the case of the Life Association of America vs. The Board of Assessors of St. Louis County, 49 Mo., 512. The law relied on in each case is the following clause contained in the 40th section of the law in reference to Life Insurance (Wagn Stat., 752): "All companies organized under the laws of this State, and doing the business mentioned in the first section of this act, shall pay all fees as required by

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

this section, which shall be in lieu of all fees or taxes whatever, except that they may be taxed upon their paid-up capital stock, the same as other property in the county, for county and municipal purposes." In the case here referred to, it was urged, that the fees paid and provided for as in lieu of other taxes, amounted to a commutation of the taxes or of the amount of taxes to be paid, and not to an exemption of property from taxation—which was prohibited by the Constitution.

The learned Judge, delivering the opinion of the court in that case, after examining all of the points made in the case as well as the authorities on this subject, uses this language: "No such difficulty environs this court in deciding this question. The constitution is now to be construed for the first time, and the determination herein will not interfere with property rights based upon a different adjudication. The section by which freedom from taxation is claimed is more an exemption than a commutation. It does not provide for the payment of any sum to the general revenue in lieu of taxes, but only certain fees for the support of an officer. It is incredible, that the Legislature intended that taxes on hundreds of thousands of dollars, which may come into the hands of wealthy corporations, should be commuted for the yearly payment of a hundred and fifty or two hundred dollars in official fees. But I am not inclined to the belief, that this power of commutation exists under our present constitution. The literal reading of the two clauses hereinbefore referred to is surely in opposition to it. The constitution by its injunction that no property shall be exempt from taxation, and the requirement that it should be taxed in proportion to its value, was framed with the express view of remedying a great mischief. It is well known, that under the former constitution, the burdens of taxation were often unequal and unjust. Capitalists and corporations were in the habit of getting exemptions, so that a large portion of their wealth was withdrawn from paying its proportionate share in administering the government, and a corresponding increase was thrown on those who were least

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

able to pay. \* \* \* It was to avoid this injustice and to cut off all importunity for class legislation, that the Constitution made the provision forbidding all discrimination. But if what was intended as a safeguard for the people's rights can be avoided by granting an immunity, under the pretense of accepting the merest trifle as a commutation, the instrument is practically nullified and the clause is a sheer delusion."

It is further held in that case, that as the corporation owned the property and had it in its possession, there was nothing to prevent its assessment under the general revenue law.

It is, however, contended by the plaintiff in this case, that the law authorizing the paid up capital stock of the plaintiff to be taxed, necessarily precludes the idea that any other property belonging to it should be subject to taxation; that all of the property belonging to a corporation in a stock company is necessarily included in its capital stock, and that to permit the capital stock of a corporation to be taxed and also the property belonging to the company, would be double taxation; that in the case in the 49th Mo., above referred to, the company taxed had no capital stock, and therefore, in that particular, that case differed from the one now under consideration. It is very true, that this court, in the case of *Hannibal & St. J. R. R. Co. vs. Shacklett* (30 Mo., 550), decided that the property of the company, "consisting of the road-bed, depot, cars, locomotives, and all the real and personal property necessary for the operation of the road, was not liable to taxation under the general revenue laws, for State and county purposes in any county; that the company was exempted by its charter from such taxation; that the property above mentioned was to be considered as being represented by the stock, which was to be assessed and collected in a mode specifically pointed out by law. This same view of the law was afterwards taken in the case of *The State vs. Han. & St. Jo. R. R. Co.* (37 Mo., 265), the court holding in this last case, that all property belonging to the Railroad Company was represented by its capital stock, and that it could make no difference how much property the company owned, it would all be represented by the stock of

the company ; that the stock would rise and fall just in proportion to the value of the property owned by the company. It must, however, be recollected, that these decisions were made under charters granted before the adoption of our present constitution, which provides that no property shall be exempted from taxation, except in a few cases specifically pointed out.

In a later case decided in this court (*The St. Louis Mut. Life Insurance Company vs. Charles*, 47 Mo., 462), the action was brought to recover back from the collector, money which, it was alleged, had been illegally assessed and collected by the defendant. The company was a stock company and had a capital stock of the par value of \$100,000.00. This stock was assessed, and, in addition to the stock, there was assessed for the same year against said corporation a tax upon all property owned by it, consisting of money loaned and on hand, amounting to the sum of \$300,000. It was charged that the company had paid the tax thus assessed under protest, and that, under the law of the State, no property of said corporation is liable or subject to taxation for any purpose ; that only the capital stock (\$100,000) of the corporation is subject to taxation. The assessment in that case was made under the act of Feb'y 4, 1864, which provides for the taxation of "shares of stock in banks and other incorporated companies and of property owned by incorporated companies, over and above their capital stock."

The learned judge, delivering the opinion of the court in that case, uses this language: "It is often the case, and the petition shows it to have been so in this instance, that the nominal stock, or the amount actually paid in by the stockholders represents but a part of the capital stock of the company. This company had, by its own showing, acquired at least three times the amount of its original stock, all of which, in private hands, would have been subject to taxation. There was no law that exempted it in the hands of the company. It might have been erroneously assessed, and perhaps should have been considered in valuing the stock in the hands of the

---

St. Louis Mut. Life Ins. Co. v. Board of Assessors of St. Louis Co. et al.

---

shareholders. In that case, the stock would have been valued at least at \$300,000, for it represented so much taxable property. Or, perhaps a portion of this amount was held by the plaintiff over and above its capital stock. Upon this point, the petition fails to advise us, but contents itself with the erroneous statement, in face of the statute, that no property of the plaintiff is liable to taxation. In either case, it should have been assessed, either in fixing the value of the stock or as property held in excess." The judgment in that case was for the defendant.

In the case we are now considering, it is not pretended that the capital stock of the plaintiff was assessed at anything over its par value, and yet it is admitted by the petition for the writ of *certiorari*, that the plaintiff owned the securities assessed, to the value of one million, one hundred and fifty thousand dollars, eleven and a half times the amount of the par value of the capital stock taxed. And yet it is contended, that all of this amount is represented by the capital stock of one hundred thousand dollars, and cannot be further taxed without double taxation. It is insisted, that all of the property of a corporation is represented by its capital stock, whether much or little, that if the corporation acquire property, the stock will become more valuable in proportion, and if the property is decreased the value of the stock is diminished in the same proportion. I think that this assumption is not necessarily true, and, in fact, not usually true. A corporation, having a paid-up capital of one hundred thousand dollars, might become the owners of one million dollars worth of property, and at the same time it might have contracted debts to the same amount. How would this increase the value of the stock? The value of the stock, if the debts had been created by bad management, would rather be diminished than increased, and yet, if only the capital stock could be taxed, one million dollars worth of property would be withdrawn from taxation in the hands of the corporation. It is argued that this would be double taxation, as the debts of the corporation would be taxed in the hands of the creditors of the cor-



poration. It would be difficult to see how this would be double taxation in any other sense than it would be to levy a tax on a farm worth one thousand dollars, owned by a man who was also indebted in a sum of an equal amount, and yet no one questions but that this may be done. In the latter case, it is the property that is taxed, and not what the owner is worth after the payment of his debts.

I can see no reason why a different rule should be adopted in reference to corporations. The constitution provides, that no *property, real or personal*, shall be exempt from taxation except, &c.

The law provides, that the *property* belonging to a corporation over and above its capital stock shall be taxed, &c. So it will be seen, that it is not what an individual or corporation may be worth over and above what either may be indebted, which is taxed, but it is the property owned by either on which the tax is levied. In levying taxes on property, it cannot be avoided that the same value will sometimes be twice taxed, but this does not make the tax levied illegal or void.

The most that could be claimed in justice by the plaintiff in this case, is that the amount of its capital stock should be deducted from the whole amount of its property and assets, when the capital stock is assessed at its par value, and the remainder of its entire assets be taxed as property over and above the capital stock. This seems to be the rule adopted in the last decision before referred to or I should doubt whether any amount could be deducted from the property owned by a corporation since our present constitution. If the property of the plaintiff was overtaxed, it ought to have applied to the proper authorities to have the assessment corrected; whether that could still be done we need not now decide. No such case is presented. The only question presented is, whether the plaintiff's *property* can be taxed at all, although it may amount to ten times the value of its capital stock; we think it can.

The judgment of the Circuit Court at General Term is affirmed, and the case remanded to Special Term for further proceedings. The other judges concur.

JOSEPH CRAWSHAW, *et al.*, Appellants, *vs.* AUGUSTUS SUMNER,  
Respondent.

1. *Party walls—Adjoining proprietors—Rights of—Tearing down—Re-building.*  
—The owner of each building supported by a common wall is entitled to have it supported by such wall so long as it is in a condition to uphold it, but when it becomes ruinous or dangerous, so that it endangers the safety of the property or life of the occupants, neither party is obliged to wait till the building falls down, but may proceed to rebuild; and the adjacent proprietor who refuses or neglects to join in the expense has no right of action for the damage or inconvenience which is occasioned by such repairs or rebuilding of the wall. This does not justify carelessness or negligence in doing the work.
2. *Practice, civil—Trials—Instructions—Multiplicity of—Ground of refusal.*  
—Too great a multiplicity of instructions would only tend to confuse a jury, and of itself would be a good ground for their refusal.

*Appeal from St. Louis Circuit Court.*

*Lucien Eaton*, for Appellants.

I. The third instruction given assumes, as a fact, that the Fire Department had declared this wall to be in a dangerous condition, and had ordered its removal, thus withdrawing from the jury vital questions at issue as to this very matter. This was gross error. (*Thompson vs. Botts*, 8 Mo., 710; *Chouquette vs. Barada*, 28 Mo., 491; *Merritt vs. Green*, 34 Mo., 98; *Sawyer vs. Hannibal & St. Jo. R. R. Co.*, 37 Mo., 240; *Glasgow vs. Lindell*, 50 Mo., 60.)

II. The first and second instructions given, *restrict* the injuries, for which plaintiffs could recover, to the single matter of the partition wall, and exclude from the jury all other matters, although the pleadings and the evidence relate in terms directly to other walls and other matters. This is a fatal error. (*Sigerson vs. Pomeroy*, 13 Mo., 620; *Mead vs. Broth-*

erton, 30 Mo., 201; Rose vs. Spies, 44 Mo., 20; First National Bank vs. Currie, 44 Mo., 91; Meyer vs. Pacific R. R. Co., 45 Mo., 137; Budd vs. Hoffheimer, 52 Mo., 297.)

III. A trespasser cannot escape liability for direct and immediate injuries inflicted by his own torts, on the ground that the injured party has omitted skill, care and expense proportioned to the gravity of the wrongs inflicted. The proposition is monstrous, and has no basis in reason or the authorities. The instructions given for defendant on this point were erroneous. (Douglas vs. Stephens, 18 Mo., 362; Greenland vs. Chapin, 5 Ex., 247.)

The rule invoked relates only to remote and consequential damages.

IV. The instructions refused for plaintiffs embraced correct propositions pertinent to the issues and the evidence, and to matters not covered by the instructions given, and were erroneously refused.

V. If property in the possession of the owner is injured by the acts of another, in the absence of further facts, the latter is *prima facie* liable. This was the rule of the third instruction refused. The real defense in this case was affirmative, and to be established by defendant. (Tow Co. vs. Orphan's Benefit Ins. Co., 52 Mo., 529.)

VI. Neither owner of a party wall can remove or interfere with it, unless by consent of the other. If he do so for any purpose, even for improvements within his own premises, he is liable to the other for any injury thereby arising. (Eno vs. Del Vecchio, 4 Duer., 53; Brown vs. Pentz, 11 N. Y. Legal Obs., 24; Barlock vs. Peck, 2 Duer., 90; Ogden vs. Jones, 2 Bosw., 685; Sherred vs. Cisco, 4 Sandf., 480; Campbell vs. Mesier, 4 Johns., C. H., 334; Armstrong vs. Schermerhorn, 2 N. Y. Leg. Obs., 40; Partridge vs. Gilbert, 15 N. Y., 601; S. C., 3 Duer, 185; Wolfe vs. Frost, 4 Sandf., Ch., 72; Brondage vs. Warner, 2 Hill., 145, Webster vs. Stephens, 5 Duer., 553; Watts vs. Hawkins, 5 Taunt., 20; Gibbons on Dilapidations, 110.)

*George Denison*, for Respondent.

I. The wall was a party wall. The evidence justifies the finding of the jury to that effect, and this is presumption of law, the pleadings showing that it was a wall of separation. (Washb. on Easem., [3d Ed.] 458; Partridge vs. Gilbert, 15 N. Y., 601; Campbell vs. Mesier, 4 Johns. Ch., 340.)

II. The wall was a party wall, and being ruinous and unsafe, defendant had a right to rebuild it. (Partridge vs. Gilbert, 15 N. Y., 601; Campbell vs. Mesier, 4 Johns. Ch., 340.)

III. The defendant had a right to assume that the party wall was sufficient and erected in the usual manner. (Hart vs. Baldwin, 1 N. Y. Legal Obs., p. 139.)

IV. The instructions given by the court went further than the appellants had a right to ask. The jury found that the wall was ruinous and unsafe, and this gave the respondent a right to take it down and rebuild. The court held the respondent liable for any interference with the wall, without regard to the care used.

NAPTON, Judge, delivered the opinion of the court.

This suit was brought by the lessees of a store on Fifth Street, under a lease which had four years to run, against the defendant, who was the owner and occupant of the adjoining store, for injuries received by the removal and rebuilding of the partition wall which separated the two buildings.

It seems that these two buildings had, since their erection, had a common wall between them; that the defendant built a third story on his building, and made an excavation to let in an elevator in the ground adjoining this party wall; that after this excavation and addition above, the party wall became obviously insecure and was so pronounced by the Chief or Superintendent of the Fire Department of the city; that the defendant then took down this party wall and rebuilt another on the same ground without consulting the owner of the adjoining building—though giving due notice to his tenants, the plaintiffs; and that this work of tearing down and rebuilding occasioned the injuries complained of by

plaintiffs; and this action was brought to recover damages for these injuries. Upon the trial there was abundant evidence to show that this work occasioned considerable injury to the stock of goods in plaintiff's store, and also put a stop to his business during its progress.

The details of this evidence, however, are unnecessary to be recited, as the case turns upon the propriety of the instructions. These were :

1. If the jury find from the evidence, that the wall between the buildings No. 413 and 415, North Fifth Street, St. Louis, was a party wall, located partly on the lot occupied by the plaintiffs, and partly on that of the defendant and used as a support to each building, and necessary to such support; that the defendant, without the consent of the plaintiffs, interfered with said party wall and weakened the same by cutting down the foundation wall, underpinning or otherwise, so that it became necessary to take it down and rebuild said wall, and that the plaintiffs were damaged thereby, they will find for the plaintiffs.

2. If the jury find, however, that said party wall was inherently defective, and that it became insecure and dangerous, and that it was necessary to remove and rebuild the same; that said dangerous and insecure condition and necessity for removal and rebuilding was caused directly by inherent defects in the wall and not by the acts of the defendant; and that in rebuilding said wall, the defendant acted with care and caution and diligence, then the jury will find for the defendant.

3. If the jury believe from the evidence, that said wall became dangerous through the interference with it of the defendant, Sumner, and not through its own inherent defects, independent of any acts of the defendant, rendering the same insecure, then the action of the Fire Department in declaring said wall to be in a dangerous condition and ordering its removal constitutes no defense.

4. If the jury find for the plaintiffs, they will assess in their behalf such damages as they may believe directly resulted from the acts of defendant, to-wit: direct loss or destruction

or deterioration of goods and loss of profits resulting from interruption of business, if, in the opinion of the jury, such profits would have been realized.

An additional instruction was given by the court, at the instance of the defendant, which was, that the plaintiff could not recover any damages which may have resulted from their own want of reasonable care, skill and expense, such as a prudent man would use to protect his property under the circumstances from the injuries likely to arise from taking down and rebuilding the party wall.

The plaintiffs asked 25 instructions, which were refused. We think it unnecessary to transcribe them, as the number of them alone is sufficient to justify a court in refusing them. Such a multiplicity of instructions would only tend to confuse the jury. The points of law in the case were few, indeed substantially only two—and twenty-five instructions could only be comments on particular parts of the testimony or repetitions of a principle of law, neither of which is it the duty of a court to give if the instructions given cover the whole ground of dispute.

The verdict was for the defendant, which the court refused to set aside, and the case is brought here for review.

The only question for our determination, is as to the propriety of the instructions. These instructions, it will be seen, were exceedingly favorable to the plaintiff. They assumed the law to be, as declared by Judge Sanford, in the case of *Sherred vs. Cisco*, (4 Sandf. 485) which questioned Chancellor Kent's opinion in *Campbell vs. Mesier* (4 John. Ch., 334) in regard to the right of contribution in such cases, and conceded that one proprietor of a party wall had no right to interfere with it, so long as it was safe and answered the purposes for which it was originally put up, but that when it became unsafe, or in a ruinous condition, either proprietor might tear it down and rebuild without the consent of the other, provided the work was done with reasonable expedition and proper care and skill.



This proposition in regard to the rights of the adjoining proprietor is conceded in the instructions, and the jury are only authorized by the court to find for the defendant, in case they should be of opinion that the party wall was insecure or dilapidated and unsafe, and in case this condition of the wall was not occasioned by any acts of the defendant in his attempted improvements on his house and cellar. As the case stands, then, under the finding of the jury on the instructions, we must assume that this wall was inherently defective, and that the defendant removed it with care and skill, and without delay. The facts of the case, then, as found by the jury, are substantially the same as they were in the case of *Partridge vs. Gilbert and others*, (15 N. Y., 606) in which it was expressly determined that where a party wall became insecure, the owner of either building might tear it down and rebuild it, provided he used proper care in so doing, and did not occupy any unreasonable time in the work. The point did not arise, whether he was entitled to contribution from the adjoining proprietor, in that case, nor does it here, but it is very clearly decided that the proprietor rebuilding was not responsible to his neighbor for the damage in loss of customers, interruption in business, or injury to his goods, resulting from the work.

The criticism of Judge Sanford upon Chancellor Kent's opinion in *Campbell vs. Mesier*, is based on the ground, that the learned Chancellor's doctrine was derived from the civil law, and that the common law recognized no such right as the right to rebuild and call on the adjoining proprietor to contribute one-half the expense. But a vast deal of the English chancery law is drawn from this quarter, and the propriety of this criticism is doubtful. However this may be, the case decided by Judge Denio, in 15 N. Y., (above cited) was a common law action like the present, in which the question of contribution did not arise, and the right to rebuild is placed on the same ground with a right to repair.

The principle is, that the owner of each building supported by a common wall, is entitled to have it supported by such

---

Crawshaw, et al. v. Sumner.

---

wall so long as it is in a condition to uphold it, but when it becomes ruinous or dangerous, so that it endangers the safety of the property or life of the occupants, neither party is obliged to wait till the building falls down, but may proceed to rebuild, and the adjacent proprietor, who refuses or neglects to join in the expense, has no right of action for the damage or inconvenience which is occasioned by such repairs or rebuilding of the wall. This does not justify carelessness or negligence in doing the work.

This is in substance the law declared to the jury in this case, and the court went further and declared the law to be, that if this insecure condition of the wall was brought about, not by any inherent defect in the wall, or as I suppose was meant, by any natural decay from time, but by the intervention of the party rebuilding in making certain improvements on his building, and thus overloading the capacity of the wall, on undermining it, a verdict was directed for plaintiffs; and the jury were, moreover, instructed to pay no attention to the action of the Fire Department, in condemning this wall as unsafe. Certainly the plaintiff went to the jury with very favorable instructions, the propriety of some of which might be questioned, but of which he certainly had no right to complain.

The last instruction assumes that one proprietor cannot venture to make such alterations in his building as convenience or necessity may suggest, without the consent of the other, and if such alterations are made, and the insecurity of the common wall is thus, for the first time, developed, the proprietor making them is responsible for the injury done to the adjoining one, resulting from the change, and thus, both buildings, through the obstinacy of one or the other proprietor, might retard necessary improvements in a city or town, to the great inconvenience of the public, as well as of both proprietors. The case of *Peabody vs. Gilbert* and others, does not go so far as this—there having been, in fact, no occasion from the facts of the case to pass on this point—but conceding it to be the law, the plaintiff had the benefit of it before the jury.

Judgment affirmed; the other judges concur.

---

Cramer, et al. v. Am. M. U. Express Co. and The Mer. Dis. Co.

---

**JOHN V. R. CRAMER, et al., Appellants, vs. THE AMERICAN MERCHANTS UNION EXPRESS COMPANY, AND THE MERCHANTS DISPATCH COMPANY, Respondents.**

1. *Common carriers—Liability for disposition of goods at the end of their line—Due diligence.*—Goods designed to be delivered at Vicksburg, Miss., were delivered at New York to a common carrier whose line extended only to St. Louis and were receipted for by the carrier, as shipped "via. St. Louis, care of St. Louis & Vicksburg Packet Co., for A. B. & C., Vicksburg, Miss." At the time of the arrival of the goods at St. Louis, there was no company or person in existence in St. Louis, or having an office or place of business there under the name of the St. Louis & Vicksburg Packet Co. The carrier thereupon, shipped the goods on a first class steamer on which it was usual and customary to ship goods from St. Louis to Vicksburg. The steamer was sunk on her way down and the goods partly lost, partly damaged and all detained. On suit against the carrier for such loss, damage and detention, *Held*, that it was proper for the carrier, having carried the goods to St. Louis, to store them or to forward them at once, as might be most expedient, regard being had to the nature of the goods, and that having, in the exercise of a sound discretion, forwarded them by a usual mode of transportation, the carrier's liability ceased.
2. *Common carriers—Forwarders—Notice to consignors or owners.*—A carrier who receives goods, as such, and forwards them to their destination from the end of his line in the exercise of a sound discretion, cannot be held responsible for want of notice of his action to the owner or consignor. Such responsibility would grow out of his duty as a forwarder, and could not be set up in a suit brought against him simply as a carrier.

*Appeal from St. Louis Circuit Court.*

*Marshall & Barclay*, for Appellants.

I. No common carrier is bound to do more than he contracted to do. In this instance there was no contract that placed this defendant in the position of a forwarder of goods, nor was there any authority in the contract to warrant the defendants' assuming the duties of a forwarder.

II. The defendant had no authority to deliver the goods in question to any consignee save the St. Louis and Vicksburg Packet Company at St. Louis, or to Cramer, Hume & McCown, if they had demanded them at St. Louis.

If the St. Louis and Vicksburg Packet Company were the consignees whom the defendant contracted with reference to, then, upon a failure to find these consignees, it became the

---

Cramer, et al. v. Am. M. U. Express Co. and The Mer. Dis. Co.

---

duty of the common carrier to store the goods in a safe warehouse, and notify the consignor, who then became the owner of the goods, or else to hold them and notify the consignor. (Ang. on Cor., 326; Chicago & Alton R. R. Co. vs. Scott, 42 Ill., 132; Norway Planes Co. vs. Boston & Maine Railway, 1 Gray, 263; Fox vs. Holt, 36 Conn., 550; Linn vs. N. I. S. Co., 49 N. Y., 442; Par. Con. B. 186, 210; 3 Bro. & Bing., 177; see also Stephenson vs. Hart, 4 Bing., 476; Duff vs. Budd, 3 Br. & B., 177; Hudson vs. Baxendale, 2 Hurl. & N., 575; Ostrander vs. Brown, 15 Johns., 39; Fisk vs. Newton, 1 Denio, 45; Stone vs. Watt, 31 Maine, 409; Hemphill vs. Cheene, 6 W. & S., 62; Redfield on Contracts, 241 and 256; Redfield on Railways, p. 76, cl. 18 ch. 26 S. 175, 4th Ed.; Halford vs. Adams, 2 Duer., 471; Lithtenheen vs. Boston & Providence R. R., 11 Cush. R., 70.)

Upon question of delivery, see also American Express Co. vs. Fletcher, 6 American Law Register, N. S., 21; Redfield's American Railway Cases, p. 72, and 74; 5 Barn. and Ald., 53; 3 Brod. and Bing., 177; 5 T. S., 389; Gibson vs. Culver, 17 Wend., 305; 6 Wharton, 505; Adams Express Co. vs. Darnell, 31 Ind., 20; Young vs. Smith, 3 Dara, 92; Hall vs. B. & W. R. R., 14 Allen, 439; The Santee, 2 Ben., 519; The Thames, 10 Wallace, 98, and 7 Bl. C. C., 226.)

If the goods are delivered contrary to the instructions of the consignor, whether written or verbal, the common carrier is liable. (16 Mich., 463; Redfield's Am. R. Cas. 77.)

III. Taking into consideration, that the defendant only contracted to convey the goods as far as St. Louis; that the freight was only paid to St. Louis, and that the St. Louis and Vicksburg Packet Company is the only consignee at St. Louis mentioned in the bill of lading, we are bound to conclude that the St. Louis and Vicksburg Packet Company was the consignee; and hence that a failure to deliver the goods to them, or to store them or hold them and notify the consignor, makes the defendant liable as for a conversion. (C. & N. W. R. R. vs. Merrill, 48 Ill. 425.)

*Daniel Dillon*, for Respondents.

The ultimate destination of the goods being known, and also the means of transportation which the shipper meant to employ, what was the duty of respondent, when, on arrival of the goods at St. Louis, it ascertained that the intermediate consignee to whom it was directed to deliver the goods at that point did not exist?

In *Steamboat Keystone vs. Moies*, (28 Mo., 245;) the court says the carrier's duty in such a case, "is to regard himself as the agent of the owners, and as such, invested with authority to take such steps as will advance the owners' interest and purposes, consistently with a reasonable security himself for his freight and charges." Regarding the respondent as the agent of the owner of the goods, when they arrived in St. Louis, with authority as such agent to take such steps as would advance the owners' interest and purposes, was it not justified in forwarding the goods to their point of destination, by usual and customary means of shipping such goods to that point? Respondents contend that it was not only justified in so doing, but that, under the circumstances, its duty to do so was so plain that to have pursued any other course would have rendered it liable.

The shippers and owners had manifested to respondents their purpose of having the goods forwarded from St. Louis to Vicksburg, by means of river transportation; this it did by shipping the goods in care of St. Louis & Vicksburg Packet Company, at St. Louis. This, together with the admission that respondent shipped the goods on a first class steamboat, on which it was usual and customary to ship such goods from St. Louis to Vicksburg, shows that the respondent did what a man of ordinary prudence acting as agent for the owners, would do under the circumstances. And this court has said in the case of the *Steamboat Keystone vs. Moies*, (28 Mo., p. 246.) that if he pursues such a course, "he is protected by the law, whatever may be the result."

Respondents contend that the case comes clearly within the principle of the case just referred to, and that, applying the rule

---

Cramer, et al. v. Am. M. U. Express Co. and The Mer. Dis. Co.

---

laid down in that case to the admitted facts of the case at bar, it fully sustains the action of the court below.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a contract of affreightment brought by the plaintiffs, residing at Vicksburg, Mississippi, against the defendant, as a common carrier, for damages for failing to deliver goods at St. Louis, according to the terms of a bill of lading by which they were shipped from the city of New York.

The ultimate destination of the goods was Vicksburg, the residence and place of business of the plaintiffs, who were merchants. By the terms of the bill of lading the defendant was only to carry the goods to St. Louis, Missouri. The goods were marked "Cramer, Hume & McCown, Vicksburg, Miss., care St. Louis & Vicksburg Packet Co., St. Louis, Mo."

The receipts given by the defendant to the shippers in New York as the goods were being delivered, were to the same effect, and in the following form: "New York, October 2nd, 1869. Shipped on board the M. D. via. St. Louis & Vicksburg Packet Co., for Cramer, Hume & McCown, Vicksburg, Miss."

The defendant is a common carrier, its line being from New York to St. Louis. The goods were received by defendant, as above, at New York, on the 2nd day of October, 1869, and in due time were safely conveyed to St. Louis. For the purpose of the trial, the plaintiffs admitted "that at the time the goods in question arrived in St. Louis, there was no company, or person or persons in existence in St. Louis, having an office or place of business in St. Louis, named or known as the Vicksburg Packet Company; and that the W. R. Arthur at that time was a first class steamer, in which it was usual and customary to ship goods of this kind from St. Louis to Vicksburg, Miss." When the goods reached St. Louis, the defendant being unable to find the consignee, and there being no such consignee in existence as the St. Louis & Vicksburg Packet Company, shipped the goods to plaintiffs at Vicksburg, on board the above named steamboat, W. R. Arthur. The Ar-



---

Cramer, et al. v. Am. M. U. Express Co. and The Mer. Dis. Co.

---

thur was sunk ; a part of the goods were lost, a part were damaged, and the whole of them detained some four weeks longer than was necessary to make the trip from St. Louis to Vicksburg, and reached the plaintiffs too late to be sold, except at a great sacrifice, that season. The plaintiffs expended large sums of money in looking up the goods and recovering possession of the same.

It does not appear that the defendant notified the consignor or the owners at Vicksburg, that it could not find the St. Louis & Vicksburg Packet Company at St. Louis ; nor did the consignor, or owners at Vicksburg know what had become of the goods until the plaintiffs found them in possession of the Board of Underwriters at St. Louis.

The defense relied on by the defendant in its answer, was, that when it failed to find the consignees in St. Louis, it had the right to ship the goods to the plaintiffs, and that by shipping them on the steamboat Arthur to the plaintiffs at Vicksburg, it had performed its whole duty.

The plaintiffs gave evidence, in addition to the above facts, of the amount of damages they had suffered. On the case as thus made the court, at the instance of the defendant, declared the law to be, that the plaintiffs, on the evidence given, were not entitled to recover. The plaintiffs excepted to this ruling of the court, and took a non-suit with leave to move to set it aside, which motion was duly made and overruled, and the plaintiffs excepted.

The judgment of the Special Term was affirmed by the General Term, and the plaintiffs have brought the case here by appeal.

The principle that a common carrier, who has performed his duty by safely carrying goods to their destination, according to the terms of the bill of lading, can ordinarily relieve himself from further responsibility, as such, by storing them in a safe warehouse, is too familiar, and too well settled by the authorities to need illustration. (See *Ang. on Carriers* ; *Norway Planes Co. vs. Boston & Maine Railway Co.*, 1 Gray., 263 ; *Chicago & Alton R. R. Co., vs. Scott*, 42 Ill., 132 ; *Stephenson vs. Hart*, 4 Bing., 476, &c.)

This principle results from the fact, that when the consignee cannot be found or has no existence, the common carrier becomes the agent of the owner and ought to take such care of the owners' property as a prudent man would of his own. Certainly he may discharge himself from his duties as common carrier by storing the goods in a safe warehouse, and thus retain his lien for the freight, when the goods are such as may be stored without injury. But if the goods are such as will decay by detention it might become his duty to forward them at once, or have them sold for the benefit of the owners. (See *Steamboat Keystone vs. Moies*, 28 Mo., 243.)

It is evident from the facts of this case that the sole object of the plaintiffs was to have their goods forwarded to them from New York to Vicksburg. The defendant's line only extended to St. Louis, and by the terms of the bill of lading the goods were to be delivered to "The Vicksburg Packet Company" at St. Louis. As this company was not in existence and had no agency at St. Louis when the goods arrived, did not the defendant, as agent of the owners, exercise a sound discretion and act as prudence would dictate in forwarding the goods at once by a first class steamboat? This was exactly what the plaintiffs desired, as manifested by the shipment from New York.

If the defendant had stored the goods in St. Louis and they had been consumed by an accidental fire, the question might have arisen, whether it was not a paramount duty on its part to have forwarded them at once, instead of retaining them in St. Louis. But considering the kind of goods, which were merchandize bought for re-sale in Vicksburg, I think a common carrier, under the circumstances, ought to be relieved from further responsibility, as such, by adopting either course.

He would have the right to retain his lien for the freight on the goods, and for that purpose, and for the protection of the owner he might store them or he might forward them and receive his freight and charges from the second carrier, or risk the owners for payment.

---

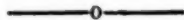
Yeats, et al. v. Ballentine.

---

In my judgment, the carrier in this instance pursued the course best calculated to promote the interests of the owners, and by delivering the goods to the steamboat was wholly relieved of all further responsibility as a common carrier.

The question of want of notice to the owners or consignors of the shipment on the steamboat, Arthur, does not arise in this case. If any responsibility at all attaches for the want of such notice, it does not grow out of the defendant's character as a common carrier, but as a forwarder of goods; and it is not sued as a forwarder, but as a common carrier.

Under this view, the demurrer to the plaintiffs' evidence was properly sustained. Judgment affirmed. Judge Wagner absent; the other judges concur.



THOMAS M. YEATS, *et al.*, Respondents, *vs.* WILLIAM BALLENTINE, Appellant.

1. *Contracts—Apportionment—Divisibility—Quantum meruit.*—A contractor who fails to comply with his contract, loses whatever damages such failure may occasion, and is not allowed, under any circumstances, to claim beyond the contract price; and at the same time, after deducting such damages and such as result from any inferiority of the work or materials to what is required by the contract, he is entitled to be paid for what his labor and materials are reasonably worth to the party using them; and this allowance is not based upon the contract by any theory of waiver by acceptance, but on the idea that the work is of value, and should be paid for. If there is no value there can be no recovery.
2. *Contracts—Breach of—Acceptance of work—Waiver, what will amount to.*—Where work and labor and materials have been expended in the production of an article not connected in any way with property belonging to the party at whose instance the work has been done, the latter is at liberty to accept it or not, and if he does accept, such acceptance is a waiver of any defense to the contract, based upon any defects in its performance. But where the work is done on property of the other party, so that its results cannot be separated from the necessary consequences of ownership, as work done on another's house or farm, the continued possession and use of such property by the owner is not a waiver of any such defense.

*Appeal from St. Louis Circuit Court.**John P. Hudgens*, for Appellant.

I. The plaintiffs could not recover on their petition in general *indebitatus assumpsit*, after admitting the existence of a contract. (8 Mo., 118; *Id.*, 517; 21 Mo., 73; Stout vs. Tribune Co., 52 Mo., 242; 37 Mo., 317; *Id.*, 307.) Yet, while the record shows, and the plaintiff swears, that all the work sued for was done under the contract, they have intentionally stated a different cause of action in their petition, to avoid an issue on the contract, and have recovered on the contract, the full contract price with 6 per cent. interest from the commencement of the suit to trial, without any reduction. (38 Mo., 51; Bouvier's Law Dict., Title *Quantum Meruit*; 14 Johns., 326; 18 Johns., 169; Greenl. on Ev., Vol. 2, § 103 and notes; Abb. N. Y. Dy., Vol. 2, p. 104, § 934; 4 Wend., 285; 11 Wend., 484; 4 Cow., 564; 10 Johns., 36; 5 Denio, 406; 4 Comst., 411; 1 E. D. Link, 395; 8 Mo., 118 (Houck Ed., p. 91 and note); 12 Johns., 274; 6 T. R., 320; 2 Moss., 147; 7 Moss., 109; 13 Johns., 94; 8 Cow., 63; 18 John., 169; 8 Mo., 118; do., 517; 18 Johns., 169; 14 Mo., 378.)

The object of the plaintiff's pleading was to take from the defendant the protection guaranteed by the contract. Defendant was not a plumber and knew nothing of the business. Hence, he provided in the contract with plumbers, that the work should be done according to plans drawn by the architect and to the satisfaction of the architect and City Inspector of Plumbing. He had a right to make this condition, and plaintiffs voluntarily accepted them and they have no right, as long as defendant stands by and insists on the contract, now to waive them nor ignore them.

In Clarke vs. Watson, referred to in Longdell's Select Cases, p. 602, in a similar case it is said: "This is, in effect, an attempt on the part of the plaintiffs to take from the defendant the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract," &c.

So, in this case, it is an attempt to take from defendant the protection of his architect and the City Inspector, and substitute for their judgment of the value and sufficiency of the work, the opinion of a jury. Defendant made no such contract.

When work is done under a special contract, the party doing it must comply with the terms of his agreement before he can recover anything, unless prevented from doing so by the act of God or of the other party. (Nelson vs. Wilson, 4 Mo., 41, (overruling Labeaume vs. Hill, 1 Mo. 42); 4 Mo., 514; 27 Mo., 308; 23 Mo., 228; 26 Mo., 102; 8 Mo., 205; 43 Mo., 123; 2 Cromt., C. Ct., 423; 3 Gal. Ed. Sut., 136a; Stout vs. St. Louis Tribune Co., 52 Mo., 342; Butler vs. Tucker, 24 Wend., 447; Smith vs. Briggs, 3 Denio, 73; Story on Cont. Vol., 1, § 32; United States vs. Rubeson, 9 Pet. U. S., 327; 4 Whart., 204; 1 McAll., 505; 4 McLean, 581; 19 Wend., 500; 2 Wall., 1; Sto. Contr., § 32; 10 Johns., 27.)

Defendant's building cost him \$75,000, and the court in effect says, that if he occupied his building he must pay for plaintiff's work, whether he accepted it or not. This is not the law. (17 N. Y., 185; 18 N. Y., 185-189; 2 Wal., 1; 19 How., 224.)

There must be voluntary acceptance of part performance to make defendant liable, and the occupation of house upon which work is done is not voluntary acceptance. (17 N. Y., 173; 24 Penn., 314.)

If the acceptance was involuntary, or was compelled only by the necessity of the case, or the defendant's wishes to retain property of his own to which the plaintiffs' work was incident or a necessary adjunct, there is no right of recovery. (Sedg. on Dam., [4 Ed.], pp. 244-9 and n.; 49 Mo., 523, affirming 29 Mo., 99.)

*Voorhis & Mason*, for Respondents.

I. There being no error of law, and the jury being the sole judges of the facts in this case, this court cannot disturb the judgment of the court below.

II. The old and rigid rule requiring the contract to be wholly performed before any recovery could be had, has been relaxed, in conformity to the rules of justice and common sense. The party who receives what is done for his benefit must respond in compensation to the extent of that benefit. The acceptance and use of the work and materials by the appellant are not controverted. (2 Pars. Con., 522; Thompson vs. Allsman, 7 Mo., 530; Dutro vs. Walter, 31 Mo., 516; Williams vs. Porter, 51 Mo., 441.)

III. The appellant does not deny, and cannot deny, indebtedness for the work and materials. He has accepted them, and has ever since used them to his exclusive benefit.

IV. The arbitrary clause inserted in the written contract, "work to be done to the satisfaction, and to the entire satisfaction of Osborne or owner," put it always in the power of an unscrupulous owner to say that the work was not to his entire satisfaction, so that he could plant himself upon unsubstantial objections and bid defiance to any recovery.

V. Under the law of this State, plaintiffs' right to abandon the contract and resort to assumpsit upon *quantum meruit* is unquestionable.

NAPTON, Judge, delivered the opinion of the court.

The plaintiffs in this case are plumbers, and brought this suit to recover from defendant the value of materials and work done on defendant's house. There were two counts in the petition, but as there was no dispute about the second count, it is unnecessary to notice it.

The defendants set up in their answer to the first count, that the work was done under a special contract, by which plaintiffs agreed to do the work according to certain plans and specifications, and at a fixed price for the aggregate job, and that the work was to be done to the satisfaction of the defendant and his architect, and the city inspector. The answer avers that the work was not done according to contract; that neither the architect or city engineer or defendant approved of it—and that in various important particulars, it



was a very bad job. A counter-claim for damages, by reason of the breach of the contract, is then set forth. Upon the trial, there was evidence, on the one hand, to show that the work was well done and the prices reasonable and usual, and on the other hand, that it was very badly done, and totally unfit for the large and costly establishment in which it was placed. The architect, especially, pointed out a great variety of bad work, unsuitable materials, and work that did not come up to the specifications of the contract, in which he was supported by the city inspector. The defendant, not professing to be a judge of such work, left the matter to his architect, and declined paying, upon the ground that the architect was not satisfied.

It appears that the defendant moved into the house, which cost \$75,000 or thereabouts, during the progress of the work of plumbing; and that he objected occasionally to certain parts of the work, which, however, were accordingly altered to suit his suggestions; that he, of course, continued to live with his family in the building after the work was completed, and made use of the various water pipes and other appurtenances and conveniences put up in the building by plaintiffs.

The court instructed the jury for plaintiffs, that if they found that the work and labor charged was done, and the materials furnished, and that the defendant used and possessed and enjoyed the same, and still is in the possession and enjoyment of the same, they would find for the plaintiffs on the first count, notwithstanding the failure to comply with the special contract, and assess their damages at the real value of the work and materials, as shown by the evidence before them, being governed by the contract price of \$950 for the aggregate, as the standard of value; and if any work required by the contract was not done, or was done in an imperfect manner, a proportional deduction should be made from the contract price. The jury were directed to allow interest at 6 per cent. from the time suit was commenced.

In regard to the counter-claim of defendant, which set up the breach of the special contract, and claimed damages therefor, the court instructed the jury, that if they found plaintiffs had not complied with the specifications of the contract read in evidence, they would assess the damages for such breach at such sum as they believed from the evidence he had sustained.

Several instructions were asked by defendant, but they were based upon a view of the law, which will be hereafter considered.

The jury found for the plaintiff on the first count, \$1121—and in regard to the counter-claim, found for the plaintiff. On the second count, about which there was no controversy, the finding was for \$121.60. Altogether, the plaintiff's damages were assessed at \$1342.60. There was a judgment accordingly, which was affirmed at the General Term by a divided court.

We find, in *Parsons on Contracts*, Vol. 2, part II, § 5, a brief summary of the legal theory on which this case was tried. It is as follows: "When parties make a contract that is not apportionable, no part of the consideration can be recovered in an action on the contract, until the whole of that for which the consideration was to be paid, is performed: But it must not be inferred from this, that a party, who has performed a part of his side of a contract, and has failed to perform the residue, is in all cases without remedy. For, though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract, and give him a remedy on a *quantum meruit*." \* \* \* "If one party, without the fault of the other, fails to perform his side of the contract in such a manner as to sue on it, still, if the other party has derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise on his part, to pay such a remuneration as the benefit conferred is reasonably worth, and to recover that *quantum* of remuneration, an action of *indebitatus assumpsit* is maintainable."

This doctrine has been applied occasionally to three classes of cases; those arising on contracts of sales; on contracts like the present, for work and labor and materials, and on contracts for services for a specified time. In the first class, the doctrine is established in England, and we suppose generally in this country, (*Oxendale vs. Wetherell*, 9 B. & C., 386; *Bowker vs. Hoyt*, 18 Pick., 555) although the New York courts seem to hold a contrary opinion. In regard to the third class of cases, the case of *Britton vs. Turner*, (6 N. H., 481) is the only one referred to by Mr. Parsons, and in this State, the decisions have been rather adverse to that opinion. But in regard to suits for work and labor and materials, this court has, from a very early period, maintained the doctrine as stated, with some qualifications. Thus, in *Thompson vs. Allsman*, (7 Mo., 531) the plaintiff was allowed under the general count, to recover the value of certain boats built by them for defendant, under a special contract, but not in conformity to its terms, upon proof that the boats were received and used by defendant.

In *Lee vs. Ashbrook*, (14 Mo., 379) the court decided that "although a party has abandoned his work before completion, without just cause or legal excuse, yet if the other party to the contract receives it, makes use of it, and is benefited by it, he ought still to pay the value of the work, not exceeding the contract price, if that value exceeds the damage he has sustained by reason of the failure to complete the work.

In *Marsh vs. Richards*, (29 Mo., 105) this position is reiterated, "although," observes Judge Scott, "it is generally true that a party must perform his contract before he can be entitled to the compensation due on its performance, unless it is otherwise stipulated, yet there are cases in which the services rendered by the contractor, are valuable to him for whom they were performed, and he has expressly or tacitly accepted them. In such cases, although the work has not been done within the stipulated time, nor in the manner or with the materials required by the terms of the contract, he who performs the work may recover what it is reasonably worth to the owner, not exceeding the contract price."

In *Lowe vs. Sinclair*, (27 Mo., 310) the same rule is declared, the court observing (Richardson, J.) "If Weaver failed to perform the work according to the stipulations of his agreement, he could not recover on the special contract; but if services were rendered by him, which were of value to the plaintiff, and were accepted by him, he would be liable to pay the actual value of the work performed, not exceeding the contract price, after deducting for any damage which had resulted from a breach of the contract," citing *Lee vs. Ashbrook*, etc.

In *Lamb vs. Brolaski*, (38 Mo., 53) the case of *Lee vs. Ashbrook* is again cited, and it is declared that, although the work had been badly done, and not according to contract, yet the party accepting the work ought still to pay the value of the work received, not exceeding the contract price, if that value exceeds the damage sustained by reason of the failure of the other to complete the work as agreed. "Such damages," (observes Holmes, J.) "are to be considered in diminution of the contract prices. The plaintiff was entitled to recover on this petition, only the actual value of the work done by him, and received by defendant, within the limits of the contract prices. The matter of the damages entered into the inquiry as to the actual value of the work done by him, and that was the very thing in issue. The benefit and advantage which the defendant took by the work done, was the amount of value which he received, if any, after deducting the amount of the damage. *Britton vs. Turner*, 6 N. H., 494."

In *Creamer vs. Bates*, (49 Mo., 525) the same question is discussed and the same conclusion reached, and the cases of *Marsh vs. Richards* and *Lowe vs. Sinclair*, are cited with approbation.

These cases and others which might be cited, are sufficient to show that whatever diversities of opinion may have prevailed elsewhere, the law as quoted above from *Parsons on Contracts*, and which is and has been always the law in Massachusetts, may also be regarded as the settled law of this State. Under the restrictions adopted here, it is obviously con-

sonant to equity, and does no injustice to either party. The contractor who fails to comply with his contract, loses whatever damage such failure may occasion, and is not allowed, under any circumstances, to claim beyond the contract price, and at the same time, after deducting such damages and such as result from any inferiority of the work or materials to what is required in the contract, is to be paid for what his labor and materials are reasonably worth to the party using them.

This is, in substance, the law declared by the court on the trial of this case.

The effect of acceptance in the present case, and cases of similar kind, in establishing a waiver on the part of the defendant, of any rights he had under the contract, is certainly difficult to be maintained. When the work and labor and materials have been expended in the production of an article contracted for, not connected in any way with the property belonging to the party at whose instance the work has been done, the latter is at liberty to accept the same or not, as he chooses, and if he does accept, that is certainly a very clear indication of an intention to waive any defects so far as such defects might conduce to a defense against any recovery upon the contract, and such was the case of *Thompson vs. Allsman*, (7 Mo., 531) where the defendant received the boats that were built for him. But where the plaintiff or contractor has done work on the house of defendant, the fact that the defendant continues to live in his house, can hardly be regarded as an acceptance of the work, as a waiver. So where a laborer, who has hired himself to work on a farm for six months, and leaves at the end of one month, his work during the month cannot be repudiated or accepted—its results are such as cannot be separated from the necessary consequences of ownership—and that the owner, in such cases, retains his farm, or continues to live in his house, is no evidence of waiver or acceptance. But this idea of acceptance, as a waiver, is not the ground upon which courts have allowed a recovery on a *quantum meruit* count. It is because the

work is of value to the proprietor, and if it is of no value, there can be no recovery.

There was evidence in this case, that the work done by plaintiffs was of no value to defendant, and was, in fact, an injury to his house, but there was evidence also, that the work was fully worth the prices charged in the petition and account, which exceeded the contract prices. We must take it, under the verdict, that the work was worth the contract price to the defendant; we must also assume that the defendant was not injured by any failure of the plaintiffs to comply with the specifications of the contract—for the jury have so found under the instructions.

A prominent objection set forth in the defendant's instructions to any recovery in this case, is based on that part of the contract, which requires the approval of the architect and city inspector and proprietor of the work—and as there was no such approval, it is insisted that there could be no recovery. There certainly could be none in a suit on the contract, but this action is not on the contract. It is conceded that the contract was not complied with, and that the architect and city inspector pronounced the work incomplete, and totally inadequate to the requirements of the contract. But as the action was upon a *quantum valebat*, the only question for the jury was upon the actual value of the work used by defendant; and on this question the opinions of the architect and the city inspector were before the jury, as were the estimates of the witnesses, and the jury disregarded the opinions of the architect and the city inspector, and thought proper to follow those of other witnesses. As these witnesses were all alike competent, it is out of our province to interfere with a verdict rendered on their evidence. When it is established that a contract may be abandoned, and a suit upon *quantum meruit* or *quantum valebat* be maintained, it follows that this provision in regard to the persons selected to decide on the compliance with its specifications, is of no avail as a defense. Their testimony stands on the same ground as that of other witnesses. The ground of recovery is the reception and use of materials



---

Longuemare v. Busby.

---

and labor furnished by plaintiffs, under a contract not complied with, but which in equity ought to be paid for, at a price commensurate with their value to the party using them, not exceeding the contract price. The instructions asked upon this point were, therefore, properly refused.

The objections to the verdict and judgment in this case are not referable to any points of law decided by the court which presided on the trial, but to the finding of the jury, which did not exceed the contract price, and the court is bound by such finding. We shall, therefore, affirm such judgment. The other judges concur.



LEON LONGUEMARE, Respondent, *vs.* JOHN BUSBY, Appellant.

1. *Practice, Supreme Court—Evidence will not be weighed in the Supreme Court.*—Where there is evidence tending to prove both sides of the case, it will not be weighed by the Supreme Court.
2. *Practice, civil—Trials—Instructions stating abstract principles not adapted to the facts, improper.*—Instructions should always be framed with reference to the issues and evidence in the cause. It is not error in a court to refuse to give an instruction containing an abstract principle of law, if, from the facts of the case, the instruction is not applicable or would tend to mislead the jury.
3. *Practice, civil—Trials—Instructions should apply to theories of both sides—Fraud—Should not be ignored by instructions.*—An instruction which ignores facts which would make a contract fraudulent or ignores the theory of either side based upon such facts is erroneous.
4. *Contracts—Agency—Fraud—Deed of trust—Sale under—Purchase of trust property by agent of cestui que trust.*—An agreement between a purchaser, and a person acting as agent for both the *cestui que trust* and the vendee, under which the vendee and agent were to purchase in the name of the vendee for their joint benefit the property sold under a deed of trust, without making it bring the amount of the debt secured, when the property sold was of a value much greater than the amount of the debt, would be fraudulent, and would not be upheld by the courts.

*Appeal from St. Louis Circuit Court.*

Henry B. O'Reilly, for Appellant.

Donovan & Conroy, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought on two promissory notes executed by the defendant to the plaintiff, one for fifteen hundred dollars and the other for seventy-five dollars.

The defendant, by answer, set up as a defense to the action, that the notes were obtained from defendant by the plaintiff through fraud, misrepresentation and deceit, and that the consideration for which the notes had been executed had, in the greater part, or entirely failed; and stated the facts in reference thereto to be substantially as follows: That in August, 1868, by virtue of a deed of trust executed by one Dennis Devoy, lot 5 of block 47, in Convent Addition to the City of St. Louis was exposed for sale at public auction at the Court House, to enforce the payment of certain notes thereby secured and then held by plaintiff; that at such sale, one John F. Gibbons attended in behalf of defendant and purchased said lot in the name of defendant, but on the joint account and for the joint use of said Gibbons and defendant, which purchase was made at and for the sum of five hundred dollars, that sum being the highest sum bid or offered for said lot; that Gibbons was also the agent of the plaintiff in conducting the sale of said lot; that said Gibbons, after the sale and purchase as aforesaid, falsely represented to defendant, that said lot had been sold to him at said sale for fifteen hundred dollars, and that he, acting as agent of the defendant, had bid in said lot for him at said price; that the defendant being wholly ignorant of the facts, but confidently relying on the representations of said Gibbons, who was acting for plaintiff, executed the notes sued on, as well as four other notes of the same date for the sum of \$75 each, payable in six, twelve, eighteen, twenty-four and thirty-six months after date respectively, and delivered them to plaintiff without any other or farther consideration whatever, than the purchase money of said lot; that the defendant has paid plaintiff of these notes for seventy-five dollars each, the aggregate sum of three hundred and seventy-five dollars, which leaves a balance of one hundred and twenty-five dollars, which is due plaintiff, and which defendant avers a willingness to pay, &c.

The plaintiff, in his replication, denied the allegations of fraud and misrepresentations contained in the answer, and avers that the consideration of the notes was money loaned by the plaintiff to the defendant.

The case was tried by a jury. The facts of the case, as they appear in the bill of exceptions, which are uncontradicted, are about as follows: That on the 10th day of August, 1868, and for some time previous thereto, and for a long time after said time, one John F. Gibbons was the duly authorized agent of the plaintiff to loan money for him, and take securities for money loaned for plaintiff and collect the same, and generally to attend to plaintiff's financial business; that said Gibbons was also the agent for the defendant in the collection of rents falling due to him during the same period of time; that some years previous to August, 1868, said John F. Gibbons had, as the agent of plaintiff, loaned to one Dennis Devoy \$1,500.00 and had taken a deed of trust from said Devoy, conveying to a trustee a lot in the City of St. Louis, to secure the payment of the sum loaned, with interest; that the money secured by the deed of trust and interest had become due, amounting to about \$1,800, and was unpaid; that the deed of trust contained a power of sale upon default of payment; that said Gibbons, being the agent of plaintiff as aforesaid, caused the lot named in the deed of trust to be advertised for sale under the power in said deed; that a few days before the time fixed for the sale of the lot under the trust deed, Gibbons called the attention of Busby to the fact that said lot was to be sold, telling him that he thought there might be a speculation made by purchasing the lot, also proposing to Busby, that if he would purchase the lot that he would go in with him in the purchase and become a joint owner with him of the lot, and that they would share the profits made by a re-sale of the lot. When this suggestion was made to Busby, he and Gibbons went and examined the lot, and both agreed that the lot was worth from three to four thousand dollars, after which Busby agreed to the proposition made by Gibbons to purchase the lot on their joint account; but inasmuch as Gibbons did not want

his name to appear in the transaction, or that it should appear that he had an interest in the purchase, it was agreed that the lot should be bid off at the sale by Gibbons in the name of Busby on their joint account. It is further shown, that Gibbons did bid off and purchase in the lot, at the trustee's sale, in the name of Busby, at and for the price and sum of five hundred dollars, and that inasmuch as plaintiff did not need the money, but only wanted his money secured, so that the interest would be promptly paid, no money was paid, but Gibbons took the note of defendant for \$1,500.00, payable three years after date with six notes for \$75.00 each, to pay the interest semi-annually, until the main note became due, and thereupon a deed was made to defendant for the lot. There is no pretense that the plaintiff had any *personal* knowledge of this transaction until about the time this suit was brought, and then he only knew what he was told by Gibbons. It is further shown, that all but one of the seventy-five dollar notes had been paid, and were paid by defendant and Gibbons in equal parts, and that Gibbons had offered defendant to pay one-half of the notes sued on, provided defendant would give him one-half of the amount he had realized from the lot purchased.

The evidence was conflicting only in one particular, which was this: Gibbons testified, that at the time he and defendant entered into the arrangement to purchase the lot on their joint account, he told defendant the amount of the debt, secured by the deed of trust, due from Devoy to plaintiff, and that that amount would have to be paid to plaintiff if they purchased the lot; that this fact was well understood and agreed to by the defendant. The defendant, on the contrary, denied this part of the agreement between himself and Gibbons, or that he was informed of the amount of the debt secured to plaintiff by the deed of trust. Busby also testified, that Gibbons told him that the property had been bid in by him in the name of Busby for fifteen hundred dollars, and that it was upon that representation that he executed the notes sued on.

The foregoing being substantially the evidence in the case, the defendant moved the court to instruct the jury as follows:

1. "The jury are instructed, that the principal is bound by the acts of his agent in the course of his business as such agent; that the misrepresentations of the agent thus made are to be taken as the misrepresentations of the principal, and that knowledge of fact or fraud by the agent must be taken also to be within the knowledge of the principal."

2. "If the jury believe from the evidence, that the property mentioned in the answer of the defendant was sold to him, as therein stated, for \$500, and that thereafter, plaintiff, by his agent, falsely represented and stated to defendant, that it had been sold to him for \$1,500; and that that amount was due therefor, and that by such misrepresentations, defendant, in ignorance of the facts, was induced to and did execute and deliver to plaintiffs the notes sued on, and without any other consideration, plaintiff can only recover whatever balance of said sum of five hundred dollars the jury may find from the evidence to be due him."

These instructions were refused by the court and defendant excepted.

The case being submitted to the jury without any instructions, a verdict was returned for the plaintiff for the amount of the notes sued on and interest. The defendant in due time filed a motion to set aside the verdict and grant a new trial, on the ground that the verdict was against the law and the evidence in the case, and that the court had improperly refused to instruct the jury as moved by the defendant. This motion being overruled and final judgment rendered, the defendant again excepted and appealed to General Term of said court, where the judgment of Special Term was affirmed, from which the defendant appealed to this court.

There is certainly evidence in the cause which tends to prove each of the theories contended for by the plaintiff and defendant respectively. In such case, we will not review the facts for the purpose of ascertaining whether the verdict of

the jury is sustained by the weight of evidence or otherwise. The only question, therefore, to be considered by this court is, whether the court at the trial erred in refusing to instruct the jury as moved by the defendant.

Instructions should always be framed with reference to the issues and evidence in the cause. It is not error in a court to refuse to give an instruction, containing an abstract principle of law, if, from the facts in the case, the instruction is not applicable or would tend to mislead the jury. The first instruction in this case, while it may contain a correct principle of law, is not applicable to the facts in the case. The agent, Gibbons, was only the agent for plaintiff in loaning and collecting his money. In reference to the purchase of the lot by defendant or by Gibbons and defendant, Gibbons was the agent of the defendant; they were jointly interested in the purchase, and defendant was bound by his acts so far as the purchase was concerned; and, therefore, any instruction which the court could have given to the jury asserting an abstract principle of law as to principal and agent, without also defining to the jury the double capacity of agency in which Gibbons was acting in the transaction referred to, would only have tended to mislead.

The second instruction asked for by the defendant is also objectionable. The theory of the defendant is, that he made a contract with the plaintiff's agent, by which they agreed to become the joint purchasers of a lot that Gibbons was about to have sold on a deed of trust in favor of the plaintiff, to secure from fifteen to eighteen hundred dollars; that said lot was purchased by Gibbons, as the agent of defendant, on the joint account of Gibbons and defendant, for the sum of five hundred dollars, leaving about \$1,300 of the plaintiff's debt secured by the deed of trust unpaid; the lot at the same time being of the value of from three to four thousand dollars.

I suppose that it will not be seriously contended that such a contract, made with the plaintiff's agent, by which defendant and said agent would possess themselves of the entire property, which was held in trust for the payment of



plaintiff's debt, to the value of three or four thousand dollars, and leave plaintiff's debt unpaid, would be enforced by any court. The second instruction asked for by the defendant, wholly ignores the facts which would make the contract fraudulent as to the plaintiff, and also disregards the whole theory of the case made by plaintiff, or which the evidence tends to prove in plaintiff's favor. The said instruction was therefore properly refused.

This case was a case in which it would have been proper for the court to have given the jury instructions; but none were given and none asked by the defendant comprehending a full view of the whole case; and the jury having found for the plaintiff, we cannot say that their finding was wrong. In fact, the agent for both parties was examined as a witness, and positively testified that it was well understood by him and the defendant, that if they purchased the lot, they would have to pay the whole debt from Devoy to plaintiff, and as any agreement between them by which they agreed to purchase the lot in the name of the defendant, but for their joint benefit, without making it bring the debt of plaintiff, would have been a fraud on the plaintiff, we think the verdict of the jury was clearly right and the judgment will be affirmed. Judge Wagner is absent. The other judges concur.



SARAH A. BECKHAM, Respondent, vs. ANTHONY NACKE, Appellant.

1. *Marriage—Infants—Liability of Magistrate—Defense.*—An honest mistake by a magistrate performing a marriage ceremony as to the age of a person whom he married, is no protection against the penalty affixed by law to the performance of such ceremony when the persons married are minors, without the consent of their parents or guardians.
2. *Evidence—Age and pedigree—Family records—General Repute.*—On questions of age and pedigree, family records are admissible in evidence. General repute with the family is also sometimes admissible in such cases.

*Appeal from St. Louis Circuit Court.*

*Melville Smith*, for Appellant.

I. The statute upon which this action is based is a penal statute and must be strictly construed. (*Allsup vs. Ross*, 24 Mo., 284; *Vaughn vs. McQueen*, 9 Mo., 330.)

II. Being a penal statute, the penalty cannot be inflicted unless the act is clearly within the letter and spirit of the statute. The intent is the essence of the offense. The will must concur with the act. Ignorance or mistake in point of fact is in all cases a sufficient excuse. (*Pot. Dwar. Stat.*, 247; *Duncan vs. State*, 7 *Humph.*, 148; *Com. vs. Stout*, 7 *B. Mon.*, 247; *Fletcher vs. Lord Sondes*, 3 *Bing.*, 580; *Meyer vs. State*, 1 *Conn.*, 502, 505; *Price vs. Thornton*, 10 *Mo.*, 135, 140; *Brig Wm. Gray*, 1 *Paine* 16.)

III. Statutes must be interpreted according to the intent and meaning, and not according to the letter. (*Pott. Dwar. Stat.*, 144, and cases cited; *State vs. King*, 44 *Mo.*, 285); and even though it seem contrary to the letter. (*Sedg. Stat. Law*, 297, 298; *Bac. Abr.*, *Tit. Stat.*, I, 5, 10; *State, ex rel. etc. vs. King*, 44 *Mo.*, 285; *State, ex rel., vs. Emerson*, 39 *Mo.*, 80; *Price, vs. Thornton* 10 *Mo.*, 136; *Reddick vs. Governor, etc.*, 1 *Mo.*, 147; *Margate Pier Co., vs. Hannam*, 3 *B. & Ald.*, 266; *Canal Co. vs. R. R. Co.*, 4 *Gill. & J.*, 152; 3 *Cow.*, 89; 15 *Johns. R.*, 358.)

A statute will not generally make an act criminal, however broad its language, unless the offender's intent concurred with the act; because the common law required such concurrence to constitute a crime. (*Bish. Stat. Cr.*, 133, and cases cited.)

The general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted. (*Pot. Dwar.*, 245; *The Enterprise*, 1 *Paine*, 32; *The Mariana Flora*, 11 *Wheat.*, 1.)

The will must concur with the act. Hence, ignorance or mistake in point of fact (not law) is, in all cases of supposed offense, a sufficient excuse. (*Meyers vs. State*, 1 *Conn.*, 502, 505; *The Enterprise*, 1 *Paine*, 32; *The Brig Wm. Gray*, 1

Paine, 16; Price vs. Thornton, 10 Mo., 135, 140; Suffolk Bank vs. Worcester, 5 Pick., 106; The Mariana Flora, 11 Wheat., 1; Wertheimer vs. Howard, 30 Mo., 421.)

*C. M. Whitney*, for Respondent.

I. The reading in evidence of an entry of the minor's birth made by the deceased father in the family Bible as a part of the family record, within three hours after the child's birth, which record was ever afterward kept in the family, was clearly admissible. (1 Greenlf. Ev., [Redf. Ed.] p. 119, § 104.)

II. Proof of general reputation in the family as to age of minor, and that there was no dispute therein in respect of such age, was proper. (1 Greenl. Ev., [Redf. Ed.] pp. 118, 119, §§ 103, 104.)

The magistrate, in case of doubt, must strictly follow the statute. It will not do to inquire of the party applying to be married, his age, or of any other person. He is not charged with the duty of seeking information as to age. The defendant had no right to rely on the minor's statement as to his age, and if he chose to guess as to his age by his looks, he did it at his peril. (Donahue vs. Dougherty, 5 Rawle, 124.)

ADAMS, Judge, delivered the opinion of the court.

This was a *qui tam* action brought by the plaintiff against the defendant, who was a justice of the peace, for the penalty imposed by statute for joining in marriage her minor son without her consent.

The plaintiff was a widow and had the sole care and custody of her son, as surviving parent. The son was nineteen years of age and had the appearance of being over twenty-one, and had induced the defendant to perform the ceremony, by falsely representing that he was of age.

First—The only material point presented by the record is, whether the defendant could justify himself by setting up as a defense his want of knowledge of the age of the minor,

when he acted in good faith and used due diligence to procure the required information. This action is founded on the sixth section of the marriage act (2 Wagn. Stat., 930) which prescribes that "if any such person shall join in marriage any minor without a written certificate of consent under the hand of the parent, guardian or other person under whose care and government the minor may be, or the presence and consent of the parent, etc., such person shall forfeit three hundred dollars, to be recovered with costs of suit by civil action in any court having cognizance, by the parent, guardian, or person having charge of such minor; the one-half of the forfeiture to the use of the county, and the other half to the use of the person who shall prosecute for the same."

The statute provides the means by which any person performing the ceremony may easily protect himself from this penalty. He must have the written consent of the parent, guardian, or other person having charge of the minor. It is not sufficient that he should act under the *bona fide* belief that such minor is of full age. His honest mistake in this regard will not protect him. The law explicitly declares what is required for his protection, and unless he adopts the means pointed out by the statute he must suffer the consequences.

We recognize the principle that penal statutes must be strictly construed. But this statute will not admit of any other construction than the one we have given, without violating the evident intention of the Legislature, which was to prevent the reckless marriages of minors without the presence or consent of those under whose care the law had placed them. (*Medlock vs. Brown*, 4 Mo., 379; *Vaughn vs. McQueen*, 9 Mo., 327; *Donahue vs. Dougherty*, 5 Rawle, 124.)

Second—On questions of pedigree and the births of children the family records are admissible as evidence. General repute in the family is also sometimes admissible as evidence in such cases. This evidence was objected to in this case. But the proof on the question as to the birth of this minor, was so clear and positive, that we would not feel justified in

---

Bartholow, et al. v. Barnard, et al.

---

disturbing this judgment even if there had been error in admitting this evidence. From the whole record the judgment was clearly for the right party.

Judgment affirmed. Judge Wagner absent; the other judges concur.

—o—

THOMAS J. BARTHLOW, *et al.*, Respondents, *vs.* WILLIAM D. W. BARNARD, *et al.*, Appellants.

1. *Bills and Notes—Protest—Due diligence—Excuse for failure to protest.*—The question whether the maker of a promissory note had left his place of residence so that a demand of payment could not be made there; or whether he had a place of business in the city where he resided, where such demand could be made, are questions of fact for the jury.

*Appeal from St. Louis Circuit Court.*

*Krum & Patrick*, for Appellant Ford.

I. In *Gilchrist vs. Donnell*, (53 Mo., 591) this court says, "It was the duty of the notary to inquire at least of all the parties to the note, if accessible to him, as to the residence of the defendants." (See *Dennis vs. Walker*, 7 N. H., 199; *Packard vs. Lyon*, 5 Duer., 82; *Wheeler vs. Field*, 6 Met., 290; *Porter vs. Judson*, 1 Gray, 175.)

The notary, if not bound to make demand at the maker's said office, was bound, inasmuch as he knew the maker was in New York, to make demand upon him there. (*Smith vs. Philbrick*, 10 Gray, 252; 1 *Parson, Notes and Bills*, p. 459, N. S.; *Galpin vs. Hard*, 3 M'Cord, 394.)

*R. H. Spencer*, for Respondents.

"Proof that the notary made inquiry of several of his acquaintances in different parts of the city of St. Louis, as to the place of business or residence of the maker of the bill, without being able to ascertain either, was held to dispense with proof of notice." (*Shepard vs. Citizen's Ins. Co.*, 8 Mo,

272; *Plahto's Adm'r vs. Patchin*, 26 Mo., 389; *Barry vs. Crowley*, 4 Gill., 203; *Pars. Notes and Bills*, pp. 448, 459; *Duncan vs. McCullough*, 4 S. & R., 480; *Franklin vs. Verbois*, 6 La., 729; *Sto. Prom. Notes*, § 235; *Hunt vs. Maybee*, 7 N. Y., 266.)

What is due diligence, can only be determined by the circumstances of the case. (*Linville vs. Welch*, 29 Mo., 203; *Bank of Columbia vs. Laurence*, 1 Pet., 578; *Harris vs. Robinson*, 4 How., (U. S.) 336; *Ranson vs. Mack*, 2 Hill, 587.)

The notary may act upon the best information he can get. *Harris vs. Robinson*, 4 How., (U. S.) 336; *Bartlett v. Isbell*, 31 Conn., 296.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note by the plaintiffs as indorsees, against Wm. D. W. Barnard, as maker, and the other defendants as prior indorsers.

The petition alleges that the maker of the note resided in the city of St. Louis, but had no domicile in the city when the note matured, which was in July, 1870, and was absent from the city and State, and had no place of business in said city where demand of payment could be made; that due diligence was used by the notary to find him, but without success.

The indorsers answered, denying all the material allegations of the petition, and a judgment by default, was taken against the maker.

The evidence tended to show that the maker was a resident of the city of St. Louis, but had no mansion house, but had a family, and had a room at a boarding house, which he furnished; that at the maturity of the note, his family had gone to Illinois, and the room had been given up to the occupant of the boarding house, and no rent was paid for the same, and no one left in charge on whom a demand could be made; and the evidence tended to show that the maker had temporarily gone to New York, and was there when the note matured.



The evidence was contradictory as to whether the maker had a place of business, and strongly tended to show that he had no place of business, and carried on no business in St. Louis. There was evidence tending to show that an attorney at law had a desk in his office which he permitted the maker of the note to use in writing letters to correspondents.

The defendant, Ford, offered to renew the note after maturity, but afterwards declined to comply with this promise. The notary inquired of various persons and business men, and could not find out the whereabouts of the maker, and thereupon protested the note for non-payment. Upon this evidence, the court refused to declare the law to be that the plaintiffs could not recover, and the defendants excepted. The defendants also asked the court to declare the law to be, "that the petition averring the residence of the defendant, Barnard, to be in the city of St. Louis, at the maturity of the note in question, and the evidence showing that Barnard was temporarily absent at the time the note became due, and while absent left a place of business open, a demand of payment should have been made at the place of business; and that the plaintiffs are not entitled to recover." This declaration was refused, and the defendants excepted. The court, thereupon, sitting as a jury, found for the plaintiffs, and overruled a motion for a new trial, and rendered final judgment in favor of the plaintiffs, which the General Term affirmed, and the defendants have appealed to this court.

The question, whether the maker of the note had left his residence so that a demand of payment could not be made there, or whether he had a place of business in St. Louis where it could be made, were questions of fact, to be found by the court sitting as a jury. The court found these facts in favor of the plaintiffs, and this finding seems to be justified by the evidence, and these were sufficient to excuse any other efforts to make a demand than what were made by the notary. The declaration of law demurring to the evidence, was, therefore, properly refused.

The other declaration asked by the defendants, assumed as true, the very point that was chiefly disputed on the trial. The dispute was, whether the maker had a place of business, at all, in St. Louis. This was a question of fact for the court sitting as a jury, to find from the evidence; and there was no error in refusing this declaration.

Judgment affirmed. Judge Wagner absent; the other judges concur.

—o—

ELLEN RICORDS, Adm'x of J. B. RICORDS, Respondent, *vs.*  
FRANCIS WATKINS, Appellant.

1. *Limitations, statute of—Trusts, express—Denial of trust.*—In express technical trusts, the statute of limitations does not begin to run until the trust is denied by the trustee; (Smith vs. Ricords, 52 Mo., 581, affirmed) but the *cestui que trust*, in case of such denial, is limited to the period allowed for the recovery of legal estates at law.
2. *Limitations, statute of—Implied Trusts—Right of action.*—In implied trusts the statute of limitations begins to run as soon as the facts are brought to the knowledge of the *cestui que trust*, so that he can take steps to enforce the trust. (Smith v. Ricords, 52 Mo. 581, affirmed.)

PER VORIES AND NAFTON, J. J., DISSENTING.

3. *Limitations, statute of—Trusts, implied—Express.*—It is not impossible that an express continuing trust, against which the statute of limitations would not run, could be shown by evidence independent of the writing conveying the property to which the trust is attached; and that it thus might be shown by independent testimony, that the possession or conduct of the trustee was consistent with, and not adverse to, the claim or right set up by the *cestui que trust*.

*Appeal from St. Louis Circuit Court.*

*Whittlesey and Lubke*, for Appellant.

*Cline, Jamison & Day*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This is the same case that was in this court under the name of Smith vs. Ricords' Adm'x, (52 Mo., 581) and we are now asked to re-consider and reverse the decision then

rendered. The only question is, whether the statute of limitations applies. The facts are stated in the former opinion, and if we admit that the evidence adduced showed an implied trust as against Ricords, it is still difficult to perceive upon what ground this bar of the statute could be prevented from running. The question as to when trustees who have acted in a fiduciary capacity may avail themselves of the statute of limitations, as a defense against liability, was thoroughly and elaborately discussed by Judge Scott in Keeton's Heirs vs. Keeton's Adm'r (20 Mo., 530). He there refers to and approves the opinion of Chancellor Kent in Kane vs. Bloodgood, (7 Johns. Ch. 110,) who after reviewing the cases on the subject, expresses the opinion that the trusts intended by the courts of equity not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity. The learned judge then continues: "but Chancellor Kent in the case to which reference has been made maintains that, if the trustee deny the right of his *cestui que trust* and assume absolute ownership, the remedy of the latter is confined to the period allowed for the recovery of legal estates at law; that so long as the trust is a subsisting one, and admitted by the act and declarations of the parties, the statute does not affect it; but when such transactions take place between trustee and *cestui que trust* as would, in case of tenants in common, amount to an ouster of one of them by the other, a court of equity would not consider length of time of no consequence." After reviewing many authorities, this branch of the opinion is concluded by quoting with approbation Angel on Limitations, where the author says, "Even in cases of direct and technical trusts, if the trustee should deny the right of his *cestui que trust* and assume absolute ownership, the latter could not be allowed a remedy beyond the period limited for the recovery of legal estates at law."

In reference to cases of the description now under consideration it is said, "In all cases of resulting, implied and constructive trusts, when a party is to be constituted a trustee by a decree of a court of equity founded on frauds, it is well settled as a rule of equity, that the statute of limitations and presumption from lapse of time will operate. With regard to the statute of limitations, it will run from the time that the facts are brought home to the knowledge of the party. He then has a cause of action and there is no reason for placing him in any better situation than any other suitor. Having a cause and being fully aware of it, there is nothing to prevent the statute from running against him. The statute to be applied in such cases is determined by the nature of the claim. Lord Redesdale in the case of *Bond vs. Hopkins*, (1 Sch. & Lef. 429,) says: "If the equitable title be not sued on within the time within which a legal title of the same nature ought to be sued upon to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title, as would bar him if his title were solely at law, he shall be barred in equity. As in suits relating to real estate courts of equity adopt the limitation of twenty years, that being the period beyond which a writ of entry is barred, so in those relating to personalty they are governed by the limitation prescribed for personal actions. Angel, § 471, says, "It is perfectly clear that, whenever a person takes possession of the property in his own name, and is afterwards, by matter of evidence or by construction of law, changed into a trustee, lapse of time may be pleaded in bar. This possession entitles him, at least, to the same protection as that of a direct trustee, who, to the plaintiff's knowledge, disavows the trust and holds adversely. (*Miller vs. Mitchell*, 1 Bailey, Eq., 437; *Buchan vs. James Admr.*, Speers Ch. 375.)"

Without attempting to go any farther, this authority ought to be decisive of the question. In two recent cases the very point has been adjudged that where the trust is not direct or

---

Green, et al. v. Indianapolis & St. Louis R. R. Co.

---

express, but arises merely by implication, the statute of limitations will be a complete bar. (McLane vs. Sheppard, 6 C. E. Green, 76; Ashburst Appeal, 60 Penn. St., 290.)

In 1855, Smith indorsed the note to Ricords, the legal title was then in the latter, and if he held it as a trustee for the former, it was an implied trust, and could only be enforced by a decree in equity upon the introduction of extrinsic evidence. Ricords could only be charged as trustee by matter of evidence. Smith was perfectly aware of his rights, but for nearly twenty years, took no steps to assert his equitable interests.

In the language of the above cases, having a cause and being fully aware of it, there is nothing to prevent the statute from running against him.

The judgment should be affirmed; the other judges concur.

VORIES, Judge, delivered the dissenting opinion.

I concur in affirming the judgment, but I do not agree that an express continuing trust against which the statute of limitations would not run, could not be shown by evidence independent of the writing conveying the property to which the trust is attached; and thus by independent evidence show that the possession or conduct of the defendant was consistent with and not adverse to the claim or right claimed by the plaintiff.

Napton, Judge, concurs.

—O—

ORANGE F. GREEN, et al., Respondents, vs. INDIANAPOLIS & ST. LOUIS RAILROAD Co., Appellant.

1. Judgment affirmed.

*Appeal from St. Louis Circuit Court.*

C. M. Whitney, for Appellant.

Lucien Eaton, for Respondents.

ADAMS, Judge, delivered the opinion of the court.

This was an action against the defendant, as a common carrier, for violating a contract of affreightment in failing to deliver fifty barrels of boiled cider, in good order and condition. The plaintiffs claimed one hundred dollars damages.

The case was submitted to a jury for trial, and on the trial it was agreed that the only defense relied on, was that the cider had fermented. It was agreed, also, that there were only two barrels in dispute. The cider was all in apparent good order when received by the defendant. The two barrels referred to were delivered to the plaintiff with the heads bursted out, leaving only about a pint of cider in each barrel. The evidence, on the part of the plaintiff, was that the remainder of the cider in the two barrels in dispute, was sweet, and that it had not fermented.

The plaintiff's evidence also tended to prove that the cider in dispute had been boiled down, five barrels into one, and that when cider is thus reduced, it will not ferment.

There was no evidence given on the part of the defendant, that the cider in dispute had fermented. The only evidence given was, that cider boiled three barrels into one, would ferment, and the opinions of his witnesses were, that boiled cider would ferment. None of the defendant's witnesses had seen this cider, or gave any testimony about it. There was no dispute as to the value of the cider. On this evidence, the court gave the following instruction to the jury, which was excepted to by the defendant: "The jury will find for the plaintiffs, and they will assess the damages not exceeding one hundred dollars, at the value of the boiled cider in St. Louis, on the 2nd day of November, 1870, and compute interest at the rate of six per cent. per annum, from July 25, 1872, to this date."

This suit was commenced on the 25th of July, 1872. The jury found a verdict for the plaintiff, and the defendant filed a motion for a new trial, which was overruled, and final judgment entered on the verdict. This judgment was affirmed by the General Term, and the defendant has appealed to this court.



---

Ackley, et al. v. Staehlin.

---

The *onus* to prove the defense relied on, was upon the defendant. There was no evidence given tending to prove that the cider in the two barrels in dispute had fermented. The plaintiff's case, therefore, stood admitted on the record, except as to the amount of damages.

There was no error in directing the jury to find for the plaintiffs. As this is the only point raised by the record, the judgment must be affirmed. Judgment affirmed. Judge Wagner absent; the other judges concur.

---

ELI ACKLEY, *et al.*, Appellants, *vs.* CHRISTIAN STAEHLIN, Respondent.

1. *Partners—Rights of—Appropriation of partnership property to payment of separate debt of one partner.*—While there is no doubt about the power of one partner to dispose of the property of the firm by *bona fide* sales, yet he cannot appropriate it, without the consent of his co-partner, to the payment of his individual debts, either with or without the knowledge of the creditor that such property belonged to the partnership.
2. *Practice—Supreme Court—Verdict contrary to evidence.*—While the Supreme Court, in law cases, will not generally weigh evidence or disturb a verdict where there is conflicting testimony, yet where the verdict is manifestly against the evidence and instructions, the Supreme Court will interfere and reverse the judgment.

*Appeal from St. Louis Circuit Court.*

*Henderson & Shields*, for Appellants.

I. This is not a case of conflicting testimony, but one where the verdict is directly contrary to all the evidence. In such cases, the Supreme Court will consider the evidence and reverse the judgment. (*Dedo vs. White*, 50 Mo., 241; *State, ex rel., Nicholson, vs. Rombauer*, 44 Mo., 590, 595; *State vs. Burnside*, 37 Mo., 343, 346; *Morris vs. Barnes*, 35 Mo., 412; *Hartt vs. Leavenworth*, 11 Mo., 629; *Hayneman vs. Garneau*, 33 Mo., 565; *Blumenthal vs. Torini*, 40 Mo., 159; *Meyer vs. Pacific R. R.*, *Id.* 151; *Baker vs. Stonebraker's Adm'r*, 36 Mo., 338, 345.)

---

Ackley, et al. v. Staehlin.

---

II. In support of the instructions, and the view of the court below on the law, we cite: *Dob vs. Halsey*, 16 Johns., 34; *Yale vs. Yale*, 13 Conn., 185, 190; *Hickman vs. Reineking*, 6 Black., 387; *Lanier vs. McCabe*, 2 Fla., 32; *Daniel vs. Daniel*, 9 B. Mon., 195-6; *Bourne vs. Woolbridge*, 10 B. Mon., 493; *Rogers vs. Batchelor*, 12 Pet., 229; *Brewster vs. Mott*, 5 Ill., 378; *Purdy vs. Powers*, 6 Barr., 492; *Minor vs. Gow.*, 11 S. & M., 322, 324; *Noble vs. McClintock*, 2 Watts & S., 152, 155; *Burrell vs. Springfield*, 15 Ala., 274; *Pierce vs. Pass*, 1 Porter, 232; 2 *Bailey*, 133; *Jones' Case*, Overton, 455; *Flanagan vs. Alexander*, 50 Mo., 51.

*Jecko & Hospes*, for Respondent.

I. The only issues in the case were issues of facts, and they were fairly tried under instructions most favorable to the plaintiffs; and it is well settled that this court will not interfere in such cases, particularly where the judge at *nisi prius* refuses to interfere. It was a case where the jury might fairly have weighed the evidence, and decided one way or another, and it could not have been said of them, that the verdict was against the evidence.

ADAMS, Judge, delivered the opinion of the court.

This was an action for \$1193.65, alleged to be due from defendant to plaintiffs, for sundry bales of hops sold and delivered by plaintiffs to defendant.

The petition alleges that the plaintiffs were hop merchants, doing business at Waterville, in the State of New York, and as such, sold and shipped to the defendant the hops in question, an account of which is inserted in the petition.

The answer denies that the defendant bought any hops of the plaintiffs. The answer further alleges, that Eli Ackley, one of the plaintiffs, was largely indebted to the defendant, and agreed to furnish him hops in payment of such debt, which the defendant agreed to accept, and that the said Eli Ackley did furnish him the quantity of hops mentioned in the petition, and of the value therein mentioned, in part pay-

ment of his indebtedness to defendant, which delivery is the alleged sale and delivery mentioned in plaintiffs' petition; that defendant did not know, nor did he have any means of ascertaining, whether or not the plaintiff, Yale, was a partner of said Ackley, or whether said Yale had any interest in the hops so delivered; and defendant denied that he became indebted to the plaintiffs, as co-partners or otherwise, in said sum of \$1193.65, or in any other sum.

The plaintiffs filed a replication, denying the new matter set up in the reply, and denying that the plaintiff, Eli Ackley, had any authority to appropriate the property of the firm composed of plaintiffs to his individual debts, and charging that the firm of Ackley & Yale were insolvent, not having assets sufficient to pay their debts.

The case was submitted to a jury for trial. The plaintiffs introduced evidence to prove their account. The evidence proved that the hops delivered to the defendant, were shipped to him from Waterville, N. Y., as the property of and in the firm name of plaintiffs, and all of the hops sold and shipped belonged to the plaintiffs, as co-partners, except two bales which belonged to the plaintiff, Yale, individually, and these two bales were withdrawn from the jury by an instruction given for plaintiffs. The plaintiffs also proved that the plaintiff, Yale, had no knowledge of the alleged arrangement made by Ackley with defendant, to furnish hops for his private indebtedness, and never consented thereto.

The evidence showed that the defendant received the hops under the arrangement he had made with Ackley, one of the partners of Ackley & Yale, for and on account of the private debt due him from Ackley, and that he had no knowledge at that time, that the hops belonged to the plaintiffs as co-partners. The evidence also showed that the firm of Ackley & Yale were insolvent, and the whole of their assets were not sufficient to pay their debts.

These were substantially the facts, as presented to the jury. The court, at the instance of the plaintiffs, instructed the jury "that if they find from the evidence, that the goods;

wares and merchandise mentioned in the petition, were shipped by Ackley & Yale, a firm composed of Eli Ackley and John Yale, to defendant, Christian Staehlin, and by said Staehlin received, and that the value thereof is the same claimed in the petition, the jury must find for the plaintiffs, for said amount, notwithstanding they may find that there was an agreement between Eli Ackley and the defendant Staehlin, whereby said goods, wares and merchandise were to be taken in part payment of a pre-existing debt, due by said Eli Ackley to said Staehlin, unless they find that John Yale consented to said agreement."

The court refused a counter-instruction asked by defendant.

The jury found a verdict for the defendant—and the plaintiffs in due time filed a motion for a new trial, upon the ground that the verdict was against the instructions and against the evidence. This motion was overruled, and judgment rendered in favor of the defendant, which was affirmed by the General Term, and the plaintiffs have appealed to this court. The verdict of the jury was manifestly against the law and the evidence. There seems to be no evidence to support a verdict in favor of the defendant.

It is conceded, that the hops in dispute were the property of the firm of Ackley & Yale, and there is no pretense that Yale ever consented that this property of the firm should be applied by his co-partner to the payment of his individual indebtedness due to the defendant.

One partner has no power to appropriate the effects of the partnership, to the payment of his individual debts, without the consent of his co-partners. There is no doubt about the power of one partner to dispose of the property of the firm by *bona fide* sales, but he cannot appropriate it, without the consent of his co-partners, to the payment of his individual debts, either with or without the knowledge of the creditor that such property belonged to the partnership. In *Rogers vs. Bachelor*, (12 Pet., 221) Judge Story, speaking for the court, said: "Does it make any difference that the separate creditor had no knowledge at the time, that there was a mis-

---

Ackley, et al. v. Winkelmeier.

---

appropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly he would be guilty of gross fraud; not only in morals, but in law." "But we do not think that such knowledge is an essential ingredient in such case. The true question is, whether the title to the property has passed from the partnership to the separate creditor. If not, the partnership may assert their claim to it in the hands of such creditor." (See 3 Kent Com., 44; Flanagan vs. Alexander, 50 Mo., 50.)

The judgment will be reversed, and the cause remanded. The other judges concur.

—o—

ELI ACKLEY, *et al.*, Appellants, vs. CHRISTINA WINKELMEYER,  
*et al.*, Respondents.

1. *Partnership—Contracts—Evidence.*—A firm composed of A. and others, under the firm name of A. & Co., had been doing business in another city, and had had transactions with C. doing business in St. Louis. The firm of A. & Co. was dissolved and A. formed a new partnership with B. under the name of A. & B., and succeeded to the business of the old firm. Subsequent to this change, C. sent an order for goods addressed to A. & Co., which was filled by A. & B. and a letter was written to C. by a clerk who had been in the employment of A. & Co., and continued in the employ of A. and B., advising him of the shipment of the goods; this letter was written in the name of A. & Co., and the goods were marked with their initials, and A. & Co. were credited by C. with the value of the goods. Other letters were also written by the same clerk under the name of A. & Co. to other parties, after said dissolution, concerning their business in St. Louis. After the purchase of these goods C. was garnished on an attachment against A. & Co., and paid over their value under the garnishment. On a suit by A. & B. against C. for the price of the goods, *Held*, that it was a question of fact for the jury whether B. had knowledge, at the time, of the manner in which the goods had been shipped, and that if he had such knowledge, he was bound by the letter of the clerk written to C., and that said letter was admissible in evidence; and also, that the other letters were admissible to show that the firm of A. & Co., was still in existence to parties in St. Louis as assumed to be so with the knowledge of B.

*Appeal from St. Louis Circuit Court.*

*Henderson & Shields*, for Appellants.

*E. C. Kehr*, for Respondents.

---

Ackley, et al. v. Winkelmeyer.

---

ADAMS, Judge, delivered the opinion of the court.

This was an action for the purchase money of several bales of hops, alleged by the plaintiffs to have been sold and delivered by them to the defendants.

The plaintiffs allege that they were partners under the name and style of Ackley & Yale, doing business as hop merchants at Waterville, in the State of New York, and as such, sold and delivered said hops to the defendants. The defendants, by their answer, deny that they purchased said hops of plaintiffs, and deny that they ever had any dealings with the plaintiffs. They charge and allege, that they purchased the hops in dispute from Eli Ackley & Co., who were hop merchants at Waterville, in the State of New York. They further allege, that the said Eli Ackley & Co. were indebted to Edward Benson, Christopher A. Stifel and Julius Hammerstein, of St. Louis, who sued the said Eli Ackley & Co. by attachment, before a justice of the peace having jurisdiction of the case, and defendants were garnished in that suit and a judgment rendered against them as garnishees for the amount they owed for the hops; which judgment they were compelled to, and did pay, and they set up these garnishment proceedings and payment as a bar to this suit.

The plaintiffs replied to defendant's answer, denying the new matter relied on as a discharge of the defendants. They allege that their firm was entirely distinct from that of Eli Ackley & Co.; that the firm of Eli Ackley & Co. had been dissolved several months before the firm of plaintiffs was formed, and although Eli Ackley had been a member of the former firm, and was a member of the new firm, these two firms had no connection with each other. The replication further charges that the firm of plaintiffs were insolvent and that it would take more than all their assets to pay their debts, and that Eli Ackley could have no interest whatever after payment of the firm debts.

At the trial the case was submitted to a jury. Both parties gave evidence tending strongly to prove their respective



---

Ackley, et al. v. Winkelmeier.

---

theories. On the part of the defendants, proof was given that they ordered the hops from the firm of Eli Ackley & Co., and that a letter was written in their name by their old clerk, who was also clerk of the new firm, advising the defendants of the shipment of the hops, and that the hops came marked with the initials of the old firm of Eli Ackley & Co., and the amount was placed to their credit by the defendants. This letter was objected to as evidence by the plaintiffs, but the objection was overruled. The evidence also showed that the clerk referred to had charge of the business of the new firm, just as he had of the old firm, and filled orders for hops in the same way. Other letters from the firm of Eli Ackley & Co., written by the same clerk, after the alleged dissolution, to other parties, concerning their business with parties in St. Louis, were produced and read, against the objections of plaintiffs. They were read on the ground that they furnished evidence that the old firm was still doing business in St. Louis after the alleged dissolution, and also for the purpose of identifying the old clerk's handwriting to the letter which accompanied the shipment of the hops to defendants. The court gave several instructions on the part of the plaintiffs which were very favorable and presented their theory of the case strongly to the jury. For the defendants the court instructed to the effect, that if the defendants, without any knowledge or notice of the dissolution of the firm of Eli Ackley & Co. and the formation of the new firm of Ackley & Yale, received the hops in dispute, believing them to be the property of Eli Ackley & Co., and had no information to the contrary prior to the time the judgment was rendered against them as garnishees, and if plaintiff, Yale, knew that the hops had been sent to the defendants in the name of Eli Ackley & Co., then the jury must find for defendants, although the jury may believe that the hops in question, in point of fact, belonged to the firm of Ackley & Yale.

The jury found for the defendants, and the plaintiffs filed a motion for a new trial which was overruled and judgment rendered on the verdict for defendants, which was affirmed

at General Term and the plaintiffs have appealed to this court. The case seems to have been fairly placed before the jury by the instructions given on both sides, and the verdict is supported by the evidence. The only material question of law raised is the ruling of the court in the admission of the letter written by the clerk of the new firm, who was also clerk of the old firm, advising the defendants of the shipment of the hops, and that they had been shipped to them by Eli Ackley & Co. The order had been sent to the old firm, and the new firm through their clerk, who had also been clerk of the old firm, assumed to fill the order, and in doing so to act in the name of the old firm. It was left to the jury to find from the evidence whether the plaintiff, Yale, had notice or information at the time, of the manner in which the goods had been shipped. Certainly, if he was cognizant of the fact, he ought to be bound by the act of the clerk in writing the letter in the name of the old firm. This was a question for the jury and they decided it in favor of the defendants. The identity of the clerk's handwriting was sufficiently established without introducing the other letters to identify it by way of comparison. The letters were certainly admissible to show that the firm of Eli Ackley & Co. were still in existence as to parties in St. Louis, or assumed to be so, with the knowledge or information of the plaintiffs.

Upon the whole record the judgment seems to be for the right party.

Judgment affirmed, all the judges concur.



THE UNITED STATES OF AMERICA, Respondent, vs. SILAS  
REED, Appellant.

1. *Eminent domain—Proceedings for condemnation of land—Exceptions filed out of time—Attempt at bargain with land owner—When need not appear.*  
—In proceedings for the condemnation of private property for public uses, in conformity with the act of March 10th, 1849, (Sess. Acts 1849, p. 593), as a general rule it must appear from the record that an attempt had been made to

---

United States of America v. Reed.

---

purchase the land of the owner, before it can be appropriated *in invitum*. But where the owner appears in court after the time for filing exceptions is past, and obtains leave to file them on condition of waiving all objections save as to the sufficiency of the damages, he cannot afterward avail himself of the failure of the record to show such attempt at bargain.

*Appeal from St. Louis Circuit Court.*

*S. Simmons*, for Appellant.

*Wm. Patrick*, *U. S. Dist. Att'y*, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This proceeding was commenced in the St. Louis Circuit Court in pursuance of an act passed by the Congress of the United States, entitled "An Act appropriating money for the purchase of a suitable site and erecting a building thereon in the city of St. Louis, Missouri, to be used for the purpose of a Custom House, Post Office and other Federal Offices." Approved March 27th, 1872; and also, in pursuance of an act passed by the General Assembly of the State of Missouri, entitled, "An act giving the consent of the State of Missouri to the acquisition by the United States of so much land in the City of St. Louis as may be needed for public use." Approved March 16th, 1872 for the purpose of condemning or appropriating a certain lot of defendant in the city of St. Louis to the use of the United States for purposes set forth in the petition.

The particular section of the above named statute of this State under which this proceeding was commenced, is the 3d section of the Act of 1872 (Adj. Sess. Acts 1872, page 471), which reads as follows: "That if it shall come to pass, that the title to the parcel of land needed by the United States for public use in the city of St. Louis, shall be held in whole or in part by persons unable or unwilling to convey the same, then the United States may proceed in the same manner that is provided by Chapter Sixty-six of the General Statutes of Missouri, to acquire the title of the persons so unable or unwilling to convey the same."

There is no question made in this case in reference to the sufficiency of the petition filed in the Circuit Court, praying for the appointment of commissioners to assess the value of the defendant's land; provided that it sufficiently appears therein that defendant was unable or unwilling to convey his lot or land as is provided in the above recited statute. The allegations of the petition in this respect are as follows: "The said United States represent further, that they have been unable to agree with the respective owners aforesaid of said various lots hereinbefore described, upon the proper compensation to be paid on the appropriation of said premises for the uses aforesaid, and that said Silas Reed is a non-resident of the State of Missouri."

It may be proper here to remark, that the petition joined in the same proceeding all of the several owners of separate lots situated in and forming part of the block of ground sought to be appropriated to public use, and that the defendant, Reed, is proceeding separately to set aside the award of damages awarded to him for a small lot situate in the block aforesaid.

Notice was given to the parties in conformity with the statute of this State applicable to such cases; to the resident defendants by personal service, and the non-residents by publication; and at the time fixed by the notice for the hearing of the petition, only one of the defendants appeared. Publication was made as to defendant, Reed, but he made no appearance. The petition was heard by the court and the facts therein stated deemed sufficient, and the court, after considering the matter, proceeded to appoint three commissioners to assess the damages done to the respective parties by the appropriation of their respective parcels of land, as set forth in the petition. The commissioners, after being duly sworn, as the law directs, proceeded to view the respective portions of land belonging to the respective parties, after which they made a report of their proceedings and the amount assessed to the respective parties for their respective portions of the block of land to be appropriated, separately. The damages

assessed to defendant, Reed, for the damages done him by the appropriation of his lot, were twenty thousand dollars. This report was made in conformity with the 3rd section of Article 5, Wagn. Stat., 327. By the fourth section of the same act it is provided that "the report of said commissioners may be reviewed by the court in which the proceedings are held on written exceptions filed by either party in the Clerk's office within ten days after the filing of such report, and the court shall make such order therein as right and justice may require, and may order a new appraisalment upon good cause shown, &c."

In this case the report of the commissioners was filed on the 19th of August, 1872. No exceptions were filed to the report by any of the defendants thereafter within ten days, and none were pretended to have been filed by defendant, Reed, in that time. But on the seventh day of September, 1872, the defendant appeared and filed with the clerk of the court in vacation his exceptions to the report of the commissioners. The clerk, it seems, received the exceptions and marked the same filed subject to all legal objections.

These exceptions so filed with the clerk stated as grounds of objection to the report, among a great many other things, the following: that "the damages assessed by said commissioners in their said report in favor of this respondent, Silas Reed, are grossly inadequate to compensate him for the loss by him sustained by reason of the appropriation of his said property in the petition described for the public uses therein mentioned, said property being worth at least the sum of thirty-five thousand dollars; that the said commissioners acted arbitrarily in assessing damages, in this, that they refused to allow respondent to prove the value of his said property, and refused to take any evidence of the value of the land and the improvements thereon; that said petition does not state facts sufficient to authorize the granting or the relief therein prayed; that no effort was made by said petitioners to agree with the respondent upon the proper compensation to be paid him for said appropriation of his said property, nor did the petitioners at

any time prior to the filing of their said petition, nor have they since, made him any offer therefor."

On the 12th day of September, 1872, the said Circuit Court was in session, the same being a continuation of the June Term of said court, and the court, disregarding the exceptions filed as aforesaid by said Reed, rendered a final judgment on the report of the commissioners affirming the same and reciting that the money assessed to the different parties named in the report had been paid into court, and a decree of judgment was rendered vesting the title to the several lots and parcels of ground named in the report, including that of defendant, Reed, in the United States.

After the rendition of this judgment, and without any motion having been filed to set aside or otherwise vacate the same, the said defendant Reed, on the 18th of October, 1872, appeared in said court and filed a motion in said court asking leave to file exceptions in said cause to the report of the commissioners filed therein. This last named motion was as follows: "Now at this day comes Silas Reed, one of the respondents in the above cause, by his attorney, and prays the court to grant him leave to file his exceptions to the report of the commissioners in said cause, with the same effect as if the same had been filed within ten days after the filing of the Report of the commissioners in said cause, for the following reasons: Said respondent Reed is a non-resident of this State and was a non-resident at the date of the institution of said proceedings, being employed during said time and heretofore and now as Surveyor General of Wyoming Territory, and has only been notified of said proceedings by publication, and had no actual notice thereof until on or about the 7th day of September, 1872, on which day he notified his attorney to file exceptions to the report of the commissioners, which was done immediately upon respondent Reed hearing of the proceedings had in the assessment of damages herein; so that no laches ought to be imputed to him for not filing his exceptions within ten days."

It seems from the bill of exceptions in the case that this last motion was heard on the day on which it was filed, and



after consideration of said motion by the court, said Reed was granted leave to re-file his said exceptions with respect to inadequacy of price with the same effect as if the same had been filed originally within ten days after the filing of the report of the commissioners. Afterwards, on the 8th day of November, 1872, the court granted a hearing and trial of the issues raised in said exceptions of said Reed, both parties, the petitioner and said Reed, consenting that the court should determine what additional allowance if any should be made to said Reed in the event that his exceptions should be sustained.

The court afterwards heard the cause under the agreement of the parties, and each party offered evidence tending to prove the value of the lot so set out in the petition as belonging to said Reed. The evidence was somewhat conflicting, some of the evidence tending to prove that the lot was worth not more than, if so much as the sum of twenty thousand dollars, that being the sum fixed by the commissioners in their report, while other evidence tended to show that the lot was worth more than that amount. After the evidence was heard the court overruled the exceptions filed by the defendant as to the damages allowed by the commissioners, and the defendant then filed a motion for a new trial, which being also overruled, the defendant appealed to General Term of said court, where the judgment rendered at Special Term was affirmed; from which defendant appealed to this court.

The proceedings in this case after a final judgment had been rendered on the report of the commissioners, who had been appointed by the court, seem to have been irregular and rather extraordinary. It seems that the commissioners made their report which was regularly filed in court. After the filing of the report, the statute authorizes any person whose property is sought to be appropriated, to file exceptions to the report with the clerk of the court where the proceedings are pending at any time within ten days from the time the report was filed. No exceptions were filed in this case within the time allowed, but the defendant appeared and filed exceptions some eight or ten days after the time fixed for the filing thereof had

expired. The court, after the exceptions were so filed with the clerk, seems to have (as it certainly had the right to do) disregarded the exceptions thus filed out of time, and rendered final judgment on the report of the commissioners against all of the defendants to the proceeding including the defendant Reed. After the rendition of this final judgment, and without any attempt having been made to set the same aside, the defendant Reed appears in court and asks leave of the court to file exceptions to the report of the commissioners, which, when filed, were to have the same effect as if they had been filed within ten days after the filing of the report. The court gave him permission to file an exception to the report, if the exception was confined to the amount of the compensation allowed him by the commissioners. This the defendant seems to have agreed to, and after the exceptions were allowed to be thus filed, the parties consented to submit that single question, as to the proper amount of compensation to be paid defendant for this lot, to the court for hearing and determination, and with the further agreement that the court sustained the objection to the report on the ground that the damages assessed were inadequate, that the court should go on and fix the excess of damages to be allowed beyond the amount allowed in the report. The court heard this agreed case and overruled the defendant's exceptions, of course finding that the damages allowed in the report of the commissioners was sufficient. It is from this action of the court that the appeal is taken, and we are here asked on the appeal from this judgment rendered under such a state of facts, to review the action of the court in making the order appointing commissioners. This I have before said, seems to me to be irregular, at least, as long as the final judgment rendered on the report of the commissioners remains in force, no appeal having in any way been taken therefrom.

It is however insisted, by the defendant, that no authority was given the plaintiff to commence the proceeding against his lot until plaintiff had first attempted to purchase the lot from the defendant, and defendant had refused to sell the same at a

fair price, or the defendant was not able to convey; and that as neither of these facts appear on the record the court had no jurisdiction over the matter, and could not lawfully appoint the commissioners.

It has been several times decided by this court, that in cases like this it must appear in the proceedings that there has been a strict compliance with the law under which the proceedings are had, and that it must be shown that an attempt had been made to purchase the land of the owner, before any proceeding could be commenced to appropriate the same against the will of the owner. (*Lind v. Clemens*, 44 Mo., 540; *Ellis v. Pacific R. R. Co.*, 51 Mo., 200.)

In the case under consideration the petition avers, that the United States had been unable to agree with the owners therein set forth upon the proper compensation to be paid upon the appropriation of the premises for the uses of the United States.

The court after hearing this petition, the several parties having been notified as the law directs, appointed the commissioners. It seems to me then, that it does appear upon the record that no agreement could be made for the purchase of the land, and that the court acted upon a proper finding of that fact; but be this as it may, when the defendant appeared in court and consented to waive all objections to the report of the commissioners, for the purpose of getting leave to file an exception out of time to the report, on the ground alone of the insufficiency of the damages, and went to the trial of that question by agreement, he thereby admitted that all of the facts stated in the petition, which were necessary to confer jurisdiction, were true, and that it is now too late for him to controvert said facts.

The evidence having been contradictory on the only question submitted to the court by the parties, and the court having found the facts submitted by the agreed case in favor of the plaintiff, and the evidence fully sustaining the finding, this court will not interfere.

Judge Wagner absent. The other Judges concurring, the judgment is affirmed.

---

McComas v. Covenant Mut. Life Ins. Co. of St. Louis.

---

AMERICA E. MCCOMAS, Appellant, vs. COVENANT MUTUAL LIFE  
INSURANCE COMPANY OF ST. LOUIS, Respondent.

1. *Husband and wife—Insurance policy for wife's benefit—Wife may sue in her own name.*—Where an insurance policy showed that it was effected by the husband for the benefit of his wife, the statute (Wagn. Stat., p. 1000, § 3) would not preclude the wife, after his death, from suing upon it in her own name. (Rogers v. Gosnell, 51 Mo., 466, affirmed.)
2. *Juryman—What opinion renders incompetent.*—The mere fact that a juryman has formed an opinion does not, of itself, render him incompetent. To have that effect, the opinion must be such as might influence his judgment. In suit on a policy of life insurance, where the company in its defense denied all responsibility and refused to pay anything, such defense amounts to a waiver of notice and proof of death; and where such defense is interposed to a suit on a policy which requires the insurance to be paid within sixty days after notice and proof of loss, the sum will be held due at that period after the death.

*Appeal from St. Louis Circuit Court.*

*Slayback & Hæussler*, for Appellant.

*Dryden & Dryden*, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a life policy issued by the defendant on the 29th day of October, 1862, insuring the life of Harry G. McComas, husband of the plaintiff, in the sum of five thousand dollars. The consideration on the face of the policy, and by reference to a statement on the margin, is expressed to be paid for the use and benefit of the plaintiff, the wife of the assured.

The policy was issued to the husband, and the covenant is to pay to him, his executors, administrators or assigns, in sixty days after due notice and proof of death, the sum assured, the balance of the year's premium, if any, being first deducted therefrom together with all indebtedness of the party to the company.

The annual premium to be paid was one hundred and eighty-nine dollars—ninety-five dollars of which, was to be paid in money in two equal instalments of \$47.50, and ninety-four dollars in annual notes. The husband died on the 3rd day of June, 1871, leaving the last six annual premium notes unpaid.

---

McComas v. Covenant Mut. Life Ins. Co. of St. Louis.

---

This suit was commenced on the ninth day of December, 1871, by the plaintiff as beneficiary under this policy, for the amount assured. The defendant filed a demurrer to the petition upon the ground that the plaintiff could not sue as beneficiary on this policy. This demurrer was overruled, and the same point was afterwards raised by motion in arrest and saved by an exception to the action of the court in overruling the motion.

The only material defense relied on to the merits of the action was, that the husband committed suicide, in violation of the terms of the policy. The matter in dispute was, whether the deceased was insane when he killed himself. The plaintiff gave evidence tending to prove that he was insane, and the defendant gave evidence tending to prove that he was sane when he killed himself. The case was submitted to a jury and a verdict rendered in favor of the plaintiff on the 18th day of February, 1873, for \$5,481.63-100. Motions for a new trial and in arrest were overruled, and a final judgment entered on the verdict.

The defendant appealed to the General Term and the court at General Term reversed and remanded the cause. From this judgment of reversal the plaintiff has appealed to this court.

In the progress of impaneling the jury the counsel for defendant asked them the question "whether the jury has any opinion upon the question whether a man is necessarily insane who commits suicide?" This question was objected to by plaintiff's counsel and the court sustained the objection, and to this action of the court in refusing to permit that question to be asked, and in refusing to permit the jury to answer the same the defendant duly excepted.

The defendant offered in evidence, to be deducted from any amount the jury might find in favor of the plaintiff, the six annual unpaid premium notes which are set out in the bill of exceptions. The court refused to permit these notes to be given in evidence, and to this action of the court the defendant excepted.

---

McComas v. Covenant Mut. Life Ins. Co. of St. Louis.

---

The court on its own motion gave an instruction on the issue of insanity, to which there was no exception, and which presented the merits of the case fairly to the jury. The court, also, at the instance of the plaintiff, gave the following instruction, which was excepted to by the defendant: "If the jury find for the plaintiff they will assess the damages at the sum of five thousand dollars with interest at six per cent. from the time demand was made to-wit: July 10, 1871, to the present time."

First—The first point relied on by the defendant is, that this action cannot be maintained by the plaintiff on the policy of insurance, because by the terms of the policy the sum assured was to be paid to the deceased or his executors, administrators or assigns. This objection was raised by motion in arrest, and also on the trial by objection to the admissibility of the policy of insurance as evidence. It is manifest, from the recital in the policy in regard to the consideration to be paid as premium, that this insurance was effected by the husband for the sole benefit of his wife. The husband, therefore, was constituted a trustee for his wife. He became a trustee of an express trust and his wife was the beneficiary. Our statute allows a trustee of an express trust to sue in his own name without joining with him the person for whose benefit the writ is prosecuted. (2 Wagn. Stat., 1000, § 3.) But this statute does not preclude the beneficiary under a contract like this from prosecuting a suit without joining the trustee. This contract on its face was made for the benefit of the wife alone, and she is, therefore, the real party in interest and had the right to bring this suit. A recovery by her would be a bar to another action by the trustee. In *Rogers & Peck vs. Gosnell*, (51 Mo., 466) it was held, that either the trustee or beneficiary of a contract might sue, and a recovery by either would be a bar to another action. (*Miles vs. Davis*, 19 Mo., 408; *Harney vs. Dutcher*, 15 Mo., 89; *Van Schaick vs. R. R.*, 38 N. Y., 346; *Record vs. Sanderson*, 2 How., 179; *Carter vs. The Mayor of Albany*, 43 N. Y., 399; *Lawrence vs. Fox*, 20 N. Y., 268.)



Second—The question put to the jury in regard to their opinion on the subject of insanity was properly ruled out by the court. The mere opinion of a juror does not of itself render him incompetent. It must be such as might influence his judgment. The question did not comprehend the essential ingredient as to whether he had formed an opinion which might influence his judgment. (1 Wagn. Stat., 800, § 22.) The bill of exceptions shows that after this question was overruled the court proceeded to impanel the jury; "the defendant asking the jurors of the panel no other or further questions touching their qualifications."

Third—The next point is in regard to the interest allowed by the jury under the instruction of the court, which was to allow interest from the 10th of July, 1871. The plaintiff's husband died on the 3rd of June, 1871. The policy requires the insurance to be paid in sixty days after due notice and proof of death. As the defendant denied all responsibility, and refused to pay anything, this amounted to a waiver of the notice and proof of death, and therefore, the sum assured was due sixty days after the death of the plaintiff's husband. But under the instruction of the court the jury allowed interest from about thirty-seven instead of sixty days after the death of the assured, thereby allowing interest for some twenty-three days before the principal became due. This was certainly an error which might have been corrected at the time by a *remittitur*.

Fourth—A similar error was committed in excluding the unpaid annual premium notes as evidence. They were proper evidence to be taken into consideration by the jury and to be deducted from the amount of recovery.

For these errors the case will be remanded to the special term and the judgment of the General Term so far modified as to allow the judgment of the special term to stand affirmed, provided the plaintiff will deduct, by way of *remittitur*, the excess of interest and the amount of the unpaid annual premium notes set out in bill of exceptions. If the plaintiff decline to do this, the special term is directed to set aside the verdict and judgment,

---

 Barr, et al. v. Armstrong.
 

---

and grant a new trial. The plaintiff must pay the costs of this appeal.

Judge Wagner absent; the other judges concur.



WILLIAM BARR, JOSEPH FRANKLIN and C. H. BERKING, Appellants, vs. DAVID H. ARMSTRONG, Respondent.

1. *Practice, civil—Papers in duplicate—Notice to produce, etc.*—Notice to produce is never required where the instrument to be proved and that produced are duplicate originals, or where the instrument to be proved is itself a notice.
2. *Husband and wife—Necessaries—Notice to cease furnishing, etc.*—Husband bound for afterward, when.—In order to bind the husband for goods sold the wife, after the seller has had notice to discontinue the sales, the latter must show, not only that the goods are necessities, but that the husband has failed to make an adequate supply of them.
3. *Practice, civil—Instructions.*—Instructions not based on evidence ought not to be given.
4. *Practice, civil—Instruction—May assume facts, when.*—Semble, that when testimony is clear and undisputed, an instruction may assume the truth of the matter sworn to.

*Appeal from St. Louis Circuit Court.*

*J. G. Chandler, with S. T. Glover, amicus curiæ, for Appellants.*

I. The facts to be proved by the wife, viz: the condition of her wardrobe, and her husband's refusal or neglect to supply her with things needful, were in their nature "secret facts," not susceptible of proof by any other person. She was, therefore, a competent witness, notwithstanding the general rule excluding her. (1 Greenl. Ev., § 344; *Ibid* note 3, citing, *Radeliff vs. Wales*, 1 Hill, Chy. 63; *Dickerman vs. Graves*, 6 Cush., 308; *State vs. Newbury*, 43, Mo., 429.)

A contrary doctrine puts a wife absolutely in the power of a cruel, brutal or miserly husband. Who but the wife herself could possibly testify intelligently as to the deficiencies

of her wardrobe, or what her husband had done or refused to do, with reference to supplying her wants?

II. The evidence as to the notice was clearly secondary and incompetent. (1 Greenl. Ev., 560; Lombard v. Ferguson, 15 Cal., 374.)

III. "Where the husband neglects to furnish his wife with necessities, he is liable to the tradesman who furnishes them, notwithstanding he was expressly forbidden to trust her." (Schoul. Dom. Rel., 85.)

IV. The instructions given took from the jury the right to pass upon the question of necessities, either as to class or amount. (Schoul. Dom. Rel., 78; Hall vs. Weir, 1 Allen, 261; Parks vs. Kleeber, 37 Penn. St., 251.)

V. The instructions given, assumed the burden of proof to be upon the plaintiffs; although the admitted facts establish a *prima facie* case in their favor, for the amount of the entire bill. The simple circumstance that husband and wife are living together, is held sufficient where nothing to the contrary intervenes to raise a presumption that the wife is rightfully making such purchases as she may deem necessary. Accordingly, if an action be brought against the husband for the price of goods purchased under such circumstances, it must be taken *prima facie* that these goods were supplied by his authority, and he must show that he was not responsible. (Schoul. Dom. Rel., 81; Etherington vs. Parrot, 1 Salk., 118; Holt vs. Brien, 4 B. & A., 252; McCutchens vs. McGahay, 11 Johns., 251; Tebbetts vs. Hapgood, 34 N. H., 420; Allen vs. Aldrich, 29 N. H., 73; Clifford vs. Laton, 3 Carr & Payne, 15; Frost vs. Willis, 13 Ver., 202; Rumney vs. Keyes, 7 N. H., 571.)

The instructions given assume the truth of defendant's testimony, and preclude the jury from weighing its credibility. There was no evidence whatever of the notice having been given, except that found in defendant's testimony in his own behalf; and the jury were in effect told, that on this point, as well as in his wild and contradictory statements about his wife being fully supplied, they were bound in law

to believe him. But the jury alone are to judge of the credibility of the witnesses and the weight due to their testimony, and in this instance they would have been eminently justified in disbelieving the defendant, and rejecting his entire testimony. (*Steamboat, City of Memphis, vs. Matthews*, 28 Mo., 248; *M'Afee vs. Ryan*, 11 Mo., 365.)

*A Reese*, for Respondent.

I. The notice imposed on plaintiffs the burden of showing that, from the date of its service, Mrs. Armstrong absolutely needed the goods purchased to make her comfortable. (2 Kent, 4th Ed., 146; 40 Barb., 290; 24 U. S. Dig., 320; *Kellar vs. Phillips*, 25 U. S. Dig., 274.)

VORIES, Judge, delivered the opinion of the court.

This action was brought in the St. Louis Circuit Court to recover upon an account for goods sold and delivered. The account sued on consisted of various items of goods charged to have been sold at various times, commencing on the 30th of March 1869, and ending on the 30th day of Dec. 1869, amounting in the aggregate to the sum of \$1071.60. The petition charged that the goods set forth in the account were furnished by plaintiffs to Laura M. Armstrong, the wife of the defendant, and at her request, and that the articles consisted of sundry articles of clothing which were necessary for her, and were reasonably worth the sum charged, etc.

The defendant states in his answer, that whether the plaintiffs furnished defendant's wife the goods mentioned in the plaintiffs' schedule attached to plaintiffs' petition at her request, defendant has no knowledge or information sufficient to form a belief, and asks strict proof. He denies any indebtedness to plaintiffs. Defendant says, that before the said alleged purchases he gave notice to said Barr, Duncan Co., (the assignors of plaintiffs) not to credit his wife on his account. Defendant avers that at and during the whole time of the said alleged purchases by his wife, between the 30th day of March and the 29th day of December, 1869, as stated in plaintiffs' schedule, his wife and children were already supplied with clothing and apparel reasonably sufficient and suitable

to make them comfortable at home, and to enable them to appear in reasonable order and style and condition in society, according to the real pecuniary condition of the defendant; and he denies that the articles so alleged to have been furnished his said wife were necessities, and he denies that they were worth \$1071.60, etc., and prays judgment.

The plaintiffs, in their reply to the defendant's answer, deny the notice set up in the answer, deny that defendant's wife and children were, during the time named in the answer, already supplied with clothing and apparel sufficient or suitable to their condition or otherwise by said defendant, etc.

The case was tried by a jury. Upon the trial, the plaintiffs offered in evidence to prove the issues on their part, the deposition of Laura M. Armstrong, the wife of defendant. This deposition was objected to on the part of the defendant, on the ground that she, being the wife of defendant, her evidence was incompetent against her husband, the defendant's counsel at the same time admitting that the purchases of the goods sued for, were made by Mrs. Armstrong, the wife of defendant, and delivered to her; that at the time defendant and his wife were living together at the Planters House, as husband and wife, and the defendant objected to the evidence of said witness to prove any further fact. The court sustained the objection and the plaintiff excepted. The plaintiffs then introduced evidence which tended to prove that defendant was worth in property, from three to four hundred thousand dollars; that but little of his property was productive; that his income was not large; that from the 30th of March, 1869, to the 29th of December of the same year, defendant and his family, consisting of his wife and two boys of from 8 to 10 years old, boarded at the Planters House in St. Louis, a first-class hotel; that they associated with the best of society; that Mrs. Armstrong and the children were always well clothed, and never seemed to lack for anything in that time.

The plaintiffs then introduced a dry goods retail merchant of St. Louis, to whom the bill of items contained in the account sued on was exhibited, and the witness asked to take

into consideration Mr. Armstrong's condition in life, and state what was the judgment of the witness on the bill, whether it was reasonable or not? The defendant objected to the question, and the court sustained the objection, on the ground that the question was not a question for experts to give their judgment on, but that it was a question for the jury under the evidence. To this ruling of the court, the plaintiff again excepted. The plaintiff also introduced a witness, who, after examining the bill sued on, testified that the goods named in the bill were all sold to Mrs. Armstrong, and that they were such articles as are usually purchased and used by ladies in St. Louis.

The defendant was introduced as a witness in his own behalf, and testified that he had, on the 12th day of July, 1869 served on Barr, Duncan & Co. (the parties by whom the goods sued for were sold) a notice in writing; that he had at the time retained an exact copy of the notice served on them; that he had written the notice retained and the one served or delivered to them at the same time; that he had served the one on them and retained the other, marking or writing on it the word "copy"; that the two were exactly alike in every particular. The defendant's counsel then offered to read the copy or notice retained in evidence. The counsel for the plaintiffs objected to the evidence, on the ground that the original notice must be produced, or that notice to the plaintiffs to produce the original should have been given. The court overruled the objection, and exceptions were taken. The notice was then read as follows:

"St. Louis, July 12th, 1869.

"Messrs. Barr, Duncan & Co. Gentlemen: I hereby give you notice that I will pay no bills contracted at your establishment by any member of my family, and you will, therefore, give no credit to any person or persons on my account, without my written order. Very respectfully, D. ARMSTRONG,"

Armstrong also testified that he had always furnished his family with every necessary required, either in food or clothing or otherwise, as the same was required, but had objected



to going in debt for the reason that he was hard run for money at the time, etc.

At the close of the evidence, the plaintiffs requested the court to instruct the jury as follows: "The court instructs the jury that the legal obligation rests upon every husband to supply his wife with necessities suitable to her situation and his own circumstances in life. The wife's necessities are such articles as the law deems essential to her health and comfort, such as food, lodging, clothing and medical attendance. And in this case, if the jury find from the evidence that at the time the goods in question were delivered to Laura M. Armstrong, she was the wife of the defendant; that they were living together as husband and wife at the Planters House in the city of St. Louis; that the defendant was then the owner, of the property, effects and means of the kind and value stated by the witnesses; that the goods in question were suitable to the situation of the defendant's wife and his own circumstances and condition in life, then the jury should find for the plaintiffs and assess their damages at the reasonable value of the goods, as shown by the evidence."

2nd. "The court instructs the jury that if the defendant and his wife, Laura M. Armstrong, were living together and boarding and lodging at the Planters House, in the city of St. Louis, at the time the goods in question were delivered to the wife, she then had an implied authority in law to purchase necessities for herself, and to pledge the credit of her husband therefor, and he is liable therefor without reference to his assent, and even in spite of his dissent. It is for the jury to determine from all the evidence in the case, whether the goods in question were suitable to the situation of the defendant's wife and his own circumstances and condition of life, and if the jury find that they were so suitable, and that the defendant had failed to properly supply his wife with necessities, then he is liable in this action, notwithstanding he had given notice to the plaintiff not to trust his wife."

3rd. "The court instructs the jury that a husband is bound to supply his wife with necessities suitable to her situation and his own circumstances and condition in life, and upon his

failure so to do, she has the right to supply herself at his expense, and that he cannot escape this obligation by giving notice to persons not to sell to her on his credit. If therefore, the jury find that the goods in question were necessities suitable to the situation of defendant's wife and his circumstances and condition in life, and were sold and delivered to her upon his credit, and that he had failed to supply her with such necessities, then they will disregard any notice he may have given to the plaintiffs not to sell to his wife on his credit, and find a verdict for the plaintiffs and assess their damages at the reasonable value of the goods as shown by the evidence."

These instructions were refused by the court and exceptions taken. The court then instructed the jury as follows:

1st. "The court instructs the jury that the legal obligation rests upon every husband to supply his wife with necessities suitable to her situation and his own circumstances in life. The wife's necessities are such articles as the law deems essential to her health and comfort, such as food, lodging, clothing, and medical attendance, and in this case if the jury find from the evidence that at the time the goods in question, sold prior to July 12th, 1869, were delivered to Laura M. Armstrong, she was the wife of the defendant; that they were living together as husband and wife, at the Planters House, in the city of St. Louis; that the defendant was then the owner of the property, effects and means of the kind and value stated by the witnesses; that the goods in question were suitable to the situation of the defendant's wife, and his own circumstances and condition in life, then the jury should find for the plaintiffs, and assess their damages at the reasonable value of the goods sold and delivered before July 12, 1869, as shown by the evidence."

2nd. "The court instructs the jury that plaintiffs cannot recover in this action for any goods furnished after the 12th day of July, 1869."

The jury found a verdict in favor of the plaintiffs, assessing their damages at the sum of \$344.00, the value of the goods sold before the notice was given on the 12th of July.

The plaintiffs filed a motion for a new trial, which being overruled and final judgment being rendered on the verdict,

they excepted and appealed to General Term, where the judgment rendered in Special Term was affirmed, and from which last judgment the plaintiffs have appealed to this court.

The first objection made in this court to the rulings of the Circuit Court, is in reference to the exclusion of evidence offered by the plaintiffs on the trial. The plaintiffs introduced a witness who was acquainted with the business of retailing goods in the city of St. Louis, to look at the account sued on and state whether the goods, in his judgment, were reasonable for the wife of a man in defendant's circumstances. This question was objected to by the defendant and excluded by the court, on the ground that the fact sought to be proved was not a question for an expert, but a question for the jury to decide from the facts proved. It is sufficient to say in reference to this evidence, that as the case was tried and decided by the jury, it is perfectly immaterial in this case whether the evidence was material and proper evidence or not; for there was ample evidence admitted in the case to show that the articles sold to the defendant's wife were such articles as were used and worn by ladies who moved in the same circle of society with the wife of the defendant, and so far as that question is concerned, the jury, under the instructions of the court found in favor of the plaintiffs, finding a verdict in their favor for all goods sold before the 12th day of July, 1869; the case going off as to the remainder of the account on another question growing out of the question of notice, so that it is perfectly apparent that the exclusion of the evidence in no possible view of the case affected or could affect the plaintiffs' rights.

It is next objected that the court improperly excluded the deposition of Mrs. Armstrong, the defendant's wife, as evidence in the case against the defendant. When the deposition was offered in evidence, the defendant admitted that the goods sued for were purchased by the wife and delivered by the plaintiffs to her at the time named in the account sued on, and that the defendant and his wife were living together, boarding at the Planters House, in the city of St. Louis, at the time, as husband and wife.

The defendant objected to said deposition being read to prove any further facts in the case. This objection was sustained and the deposition excluded. By the fifth section of the statute of this State concerning Witnesses (2 Wagn. Stat., 1373) it is provided that "No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party in the following cases, to-wit: First, In actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed. Second, in actions against carriers, so far as relates to the loss of property and the amount and value thereof. Third, in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband; *Provided*, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admissions or conversations of her husband whether made to herself or to third persons."

After the admissions made by the defendant it is difficult to see how the wife's evidence could become admissible to prove any other facts in issue in the action. It might be that she was impliedly her husband's agent to purchase necessities, but it was admitted that she had purchased the goods sued for, and the facts necessary to constitute her his agent would of course have to be proved by other evidence, because until it was shown that she was the agent of her husband in the transaction, she would be incompetent to testify in reference thereto, and there is no other provision of the statute under which she could possibly be rendered competent. But it is contended by the plaintiffs that the statute cannot be construed to restrict the competency of a wife to testify against her husband at common law, and that under the circumstances of this case the wife of the defendant was competent to testify by the common law. It is admitted that at common law the general rule is that the wife is incompetent to testify either for or against her husband, but it is claimed that there are exceptions to that rule and that the evidence in this case which was excluded, comes

within these exceptions. To this it may be answered, that the deposition excluded is not copied in the bill of exceptions so that we can see the exact facts offered in evidence and which were excluded, and that it would be very difficult to say whether the facts or evidence offered would come within these exceptions contained in the statute or at common law. One of these exceptions named by Greenleaf, is where the wife, if excluded, would be exposed to personal injury without any means of redress, if she were not permitted to testify. Upon a similar ground of necessity, Mr. Greenleaf says that a wife has sometimes been admitted "to testify to secret facts which no one but herself would know. Thus upon an appeal against an order of filiation in the case of a married woman, she was held a competent witness to prove her criminal connection with the defendant, though her husband was interested in the event; but for reasons of public decency and morality she cannot be allowed to say after marriage, that she had no connection with her husband, and that therefore her offspring is spurious." (1 Greenl. Ev., §§ 343-344; State v. Berlin, 42 Mo., 572.) Now it is not shown that any evidence was offered, or that any evidence was contained in the deposition excluded, which tended to prove any personal violence to the wife, or that any such secret fact as is contained in the exceptions named by Greenleaf was offered in evidence, nor can it be perceived how any such facts could be material or proper evidence in the case, even if the witness had been competent to testify. I do not think that the rule laid down in the case of the State vs. Newberry, 43 Mo., 429, is at all applicable to this case; so that from all that appears in the bill of exceptions in this case the deposition of the wife was properly excluded.

The next objection made by the plaintiffs is, that the defendant was permitted to prove that he had given notice to those furnishing the goods to his wife, not to sell her goods on his credit, by the production of what was proved to be an exact copy of the notice served, without having first given notice to the plaintiffs to produce the notice served on them, which they claim was the original notice. No notice to produce in such case was necessary. The notices in this case were both

written by the defendant at the same time; the proof shows that they were exactly alike, one delivered to Barr, Duncan & Co., the other retained by the defendant on which he wrote the word "copy." These papers were both of the same dignity. It could have made no difference which of the two had been served on the plaintiffs. In one sense each was a copy of the other, but in a legal sense they stood in the relation of duplicates to each other. And then as I understand the law, it is never required that a party should give notice to produce a notice in order to prove its contents. The rule is that notice to produce is never required where the instrument to be proved and that produced, are duplicate originals, nor where the instrument to be proved is itself a notice. (1 Greenl. Ev., § 561; Hughes v. Hayes, 4 Mo., 209.)

The only remaining questions to be disposed of in this case grow out of the giving of and refusing instructions by the court. It is contended that the court erred in refusing to give the three instructions asked for by the plaintiff as set forth in the statement of the case.

By the first instruction asked for by the plaintiffs, it will be seen that the jury are told, that if they find from the evidence that at the time the goods in question were delivered to the wife, the defendant and his wife were residing together as husband and wife, and that the defendant was then the owner of a large amount of property, &c., and that the goods in question were suitable to the situation of the defendant's wife and his own circumstances, then the jury should find for the plaintiffs the amount of the goods sold, &c. It will be seen that this instruction entirely ignores the main defense of the defendant to a great part of the account sued for. The instruction assumes that the presumptive assent of the husband to the purchase by the wife on his credit of such articles as are deemed necessities, continues after he shall have made his dissent known by giving the trader selling the goods notice to desist from selling her goods on his credit.

The law, I think is the other way. The best authorities, and I think a majority of the courts as well as the elementary writers, now hold, that, in order to bind the husband for



goods sold the wife after the seller has had notice not to do so, the seller would be bound to show not only that the goods sold are included in the class of articles denominated necessities, but he would also be required to show that the husband had failed to furnish his wife with such necessary articles. The seller in such case must show the absolute necessity for the purchase for the wife's comfort. (2 Kent's Com., [12th Ed.,] 146, 147; Schouler's Dom. Rel., 85; Kimball vs. Keyes, 11 Wend. 33; Mott vs. Comstock, 8 Wend., 544; Theriott vs. Baglioli, 9 Bosw., 578; Keller vs. Phillips, 40 Barb., 390.)

The first instruction wholly ignoring the fact of notice to the plaintiff not to credit the wife, was therefore properly refused by the court. The second and third instructions asked for by the plaintiffs, when all taken together, stated a correct abstract principle of law and should have been given if there had been any evidence in the case which tended to prove that the defendant had failed to provide his wife and family with necessities suitable to her wants and situation in society and his condition in life. It seems from the record, that these instructions were refused by the court on the ground that there was no such evidence, and after a careful examination of the record I have not been able to find any evidence which in the slightest degree tends to prove that the defendant had failed to provide all necessities for his wife, or that she was not already supplied in a proper manner. The court was therefore authorized to refuse these instructions as not being authorized by the evidence in the case. The instructions given by the court were erroneous. They assumed that the notice had been given by the defendant to the persons who sold the goods on the 12th day of July, 1869, not to sell goods on his credit, when the question whether the notice had been given or not should have been submitted to the jury, that fact was for the jury to find. The last instruction tells the jury that the plaintiffs cannot recover in this action for any goods furnished after the 12th day of July, 1869. The jury ought to have been told, that if they believed from the evidence that the notice read in evidence had been given to the persons selling the goods on the 12th day of July, 1869, then they were

not, from the evidence in the case, authorized to find against the defendant for any goods sold after that date. The first instruction given was subject to the same objection. It assumed that the notice had been given on that day. It is insisted by the defendant, however, that as the evidence of the defendant was clear, to the effect that the notice had been given on the 12th day of July, 1869, and no evidence to the contrary, that the judgment should not be reversed, even if the instructions did wrongfully assume the truth of that fact. It is very true that, in this case, the evidence was distinct and positive on the part of the defendant as to the service of the notice, and no attempt was made on the part of the plaintiffs to contradict it; although the parties receiving the notice, for aught that appears, could have been produced to contradict it. This being the case, if the question had been submitted to the jury, and the jury, against the unimpeached and uncontradicted evidence of the defendant, had found against the notice, or that no notice had been given, would the court have let the verdict stand? I suppose that in such case the court would not have hesitated to set the verdict aside. In fact, there seems to have been no other contest over the notice, except that the plaintiffs claimed that the original should be produced after the notice was admitted in evidence. There seems to have been no further contest over the fact of notice. Even the instructions asked for by the plaintiffs seem to assume that the notice had been given, and presented no issue in reference to that fact. The case seems to have been tried after the notice had been admitted in evidence, with the assumption that notice had been given, and this, I presume, is the reason why the court framed the instructions as they did. This court, therefore, notwithstanding that the instructions given by the court were erroneous in that particular, not being able to see how the plaintiffs were injured thereby, and the verdict seeming from the evidence clearly to be for the right party, will not reverse the judgment for that technical error. If there had been the least conflict in the evidence, or if the evidence in reference to the notice had been of a dubious character, the decision would have been different.

The other judges concurring, the judgment will be affirmed.

---

St. Vrain v. Columbia Bottom Levee Co.

---

**BENJAMIN ST. VRAIN, Appellant, vs. COLUMBIA BOTTOM LEVEE COMPANY, Respondent.**

1. *Practice, civil—Trials—Evidence—Instructions.*—Where testimony is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction.

*Appeal from St. Louis Circuit Court.*

*Ira C. Terry*, for Appellant.

*M. L. Gray & Geo. Denison*, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

The defendant in this case was incorporated by an act of the legislature passed March 8, 1859, with authority to "survey, locate and establish levees, ditches and embankments or other needful works," through certain tracts of land within a district in St. Louis county particularly described and bounded, and to keep such levees, ditches and embankments in use and repair. This was to be done at the cost and charges of the proprietors, and to raise the necessary funds a tax per acre, limited to \$2.00, was allowed to be levied and collected. The amendatory act of Jan'y 14, 1860, gave the company more extensive powers, not only to protect the lands from overflow from the river, but "to drain and re-claim the swamp land therein, and to keep said levees, ditches and other works in good repair, at the cost and charges of the owners," etc.

The petition in this case avers that plaintiff was the owner of a tract of land within this district, and that defendant constructed the levees and embankments so unskillfully and negligently, as to cause a large body of water to be obstructed in its natural channel and forced upon plaintiff's premises, so as to injure plaintiff's farm and render wholly useless about twenty acres of it. The allegations were all denied and the parties went to trial before a jury on the issues. The plaintiff gave evidence conducing to show that the stagnation of water on his land was caused by the overflow of a spring branch; that this overflow began in 1860, and was caused by a ditch from Lucas' Spring, and the embankment along the

---

Landis v. Home Mut. Fire & Marine Ins. Co. of St. Louis.

---

foot of a hill, in a southerly direction from the spring. There was also evidence to show that this ditch was constructed by the company, or its servants; but there was a conflict of testimony on this point. It did not appear that the levees on the river bank were negligently or unskillfully built; but there was evidence to show that these embankments so obstructed the discharge of the water in the spring branch, that the ditch from the spring let in on the plaintiff's land enough water to destroy the cultivation of some twenty acres.

At the close of the plaintiff's evidence, the court instructed the jury that plaintiff was not entitled to recover. The evidence in this case was certainly very meagre, and it is difficult to form any correct conclusion as to the facts or the law arising on them. But the plaintiff had a right to go to the jury on the disputed facts, concerning which there was evidence. The instruction given took the case entirely from the jury, and although this is well enough where there is a total absence of evidence concerning some fact essential to recovery, this cannot be said here, where two or three witnesses testified that the defendant built the ditch, and that this ditch and the levee together occasioned the injury to plaintiff's land.

Judgment reversed and case remanded.

—o—

ISRAEL LANDIS, Respondent, *vs.* HOME MUTUAL FIRE & MARINE INSURANCE COMPANY, of St. Louis, Appellant.

1. *Home Mutual Fire Ins. Co.—Cancellation of policy—Resolution of board—Notice—Company bound notwithstanding, when.*—By the terms of the charter of the Home Mutual Fire and Marine Insurance Company, of St. Louis, before the cancellation of any policy could take effect, it was to be entered on the books of the company; and it retained the right to make assessments up to that time. *Held*, that without such step the company would be liable to a policyholder in case of loss by fire, notwithstanding the fact that a resolution had been adopted by the board ordering the secretary to notify the policyholder that the company would discontinue its risk, and the fact that the resolution was transmitted by that officer, together with notification that the policy was thereby canceled, etc.

---

Landis v. Home Mut. Fire & Marine Ins. Co. of St. Louis.

---

2. *Corporations—Fire Insurance—Home Mutual—Limitation as to time of beginning suit.*—The charter of the Home Mutual Fire and Marine Insurance Company, of St. Louis, by virtue of a section adopted in 1845 and printed on its policies as a part thereof, provided that in case of loss by fire, the injured party should "present his claim to be adjusted and determined by the company, as to the amount to be paid him," etc. If not satisfied he was authorized to sue within a specified time and not afterward. Held, that the limitation as to time of suit had no application to a case where the company claimed a total exemption from all liability. In such case, the only limitation would be the bar of the general statute.

The decision in *Keim v. Home Mut. F. & M. Ins. Co.*, (42 Mo. 38) turned upon an amendment adopted in 1857, and forming no part of the policy under consideration.

*Appeal from St. Louis Circuit Court.*

*D. T. Jewett*, for Appellant.

I. The resolution of the directors and the notice in this case are in exact compliance with the "conditions of insurance." The conditions say the directors may terminate the policy after notice given of intention to do so. The notice recites the resolution and says that from and after the receipt of that notice, the policy is canceled. No length of time is required after notice and before cancellation. (27 Upper Canada, 213, 217 and 453.)

II. The action was not brought within the time required by the 10th section of the charter. It has been settled in this State, as well as in many others, that such a limitation, as to the time of bringing actions, is binding on the assured. (*Keim vs. Home M. F. & M. Ins. Co.*, 42 Mo., 38.) In this case, the company refused to pay any thing. The assured was "not satisfied with the determination of the directors," and should have sued within the time specified in the charter, after that determination was made known to him.

*James Taussig*, for Respondent.

I. Granting, for the sake of argument, the right of the company to cancel a policy, that right was not exercised in the manner pointed out in the clause invoked by the appellant.

---

Landis v. Home Mut. Fire & Marine Ins. Co. of St. Louis.

---

(a.) The resolution of the board given in evidence, directed the secretary to give notice of the intention of the company to cancel the policy, instead of which, the secretary gave notice that the policy was canceled, on receipt by the insured of the notice. The notice was not in pursuance of the resolution.

(b.) The company was bound to give to the insured reasonable notice of a time to be fixed in the future for the cancellation of the policy, so that the holder could protect himself by effecting insurance elsewhere. No such opportunity was given. And an attempt to terminate the policy at the instant of giving notice was properly disregarded.

(c.) The courts construe such conditions *strictissimi juris*. (Van Valkenburg vs. Lexington Ins. Co. [N. Y. Court of App., Jan'y, 1873,] Insurance Law Journal, Vol. 2, No. 3 p. 205, March Number, 1873; Lyman vs. State Mut. F. Ins. Co., 14 Allen, 329; see also Emmott vs. Slater, &c. Ins. Co. 7 R. I. 562.)

II. Defendant failed to prove that plaintiff's action was not brought in time.

(a.) The 10th section of the charter clearly applies only to cases in which the company admits its liability, but fails to agree with the insured as to the amount of the loss. No "determination" of the amount of loss can be had in a case where the company denies the existence of the contract of insurance. (See Boynton vs. Middlesex M. Fire Ins. Co., 4 Metc. [Mass.,] 212, Williams vs. N. Eng. M. F. Ins. Co., Williams vs. Columbia M. F. Ins. Co., Robinson vs. Same, 29 Maine, 465.)

(b.) That the company itself gave the construction above stated, and illustrated by the case of Boynton vs. Middlesex Ins. Co., (4 Metc. 212,) is very clearly shown by the act of the company in having the charter of 1845—the original charter of the company—amended by the act of 1857. (Sess. Acts 1845, p. 197, § 10, and Sess. Acts of 1857, p. 555, § 11.)

(c.) The case of Keim vs. Home M. Ins. Co., (42 Mo. 38,) is clearly not in point, for it turned upon the construction of § 11 of the Act of 1857, which differs materially from the 10th section of the charter of 1845.



---

Landis v. Home Mut. Fire & Marine Ins. Co. of St. Louis.

---

*Polk & Causey*, for Respondent.

I. Under section 10 of the Act of 1845, the party insured is required to bring suit at the next term of the court, only when the amount of the loss or damage has been ascertained and determined by the directors of the company, and the insured is not satisfied with that determination. That section has no reference to the case of a refusal to pay any thing at all.

In the case of *Keim, et al., vs. The Home M. Ins. Co.*, 42 Mo., 38, relied on as an authority, the act incorporated into the policy, is that of the 2d March, 1857. (See Acts of 1856-7, p. 558.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on a policy of insurance, issued by the defendant to plaintiff on the third day of April, 1857, insuring him in the sum of fifteen hundred dollars on a building in the city of St. Joseph, in this State, for the term of six years. By the terms of the policy the plaintiff became a member of the company during the continuance of his policy. The policy was in the usual form issued by companies on the mutual plan; and the charter of the company enacted by the Legislature of Missouri in 1845, with amendments thereto, up to and including the amendment of the 13th of February, 1849, was printed on and formed a part of the policy; and also the by-laws and conditions of insurance were printed on the policy as a part of it.

The plaintiff's property was wholly consumed by fire on the 18th day of October, 1861, and the loss was greater than the amount insured. The plaintiff proposed to comply with the stipulations of the policy in regard to notice and proof of loss, but the company waived the notice and proofs, and declined to pay anything, upon the alleged ground that the policy had been canceled.

The only points raised and discussed here and relied on for reversal are, that the policy had been duly canceled by the company before the loss occurred, and that this suit was not commenced within the time prescribed by section ten of the charter which had been made a part of the policy.

1. In regard to the first point. By one of the conditions of insurance, which formed a part of the policy, the company reserved the right, by complying with said condition, to cancel the policy. The question here is, whether this condition was complied with, and whether this policy was duly canceled by the action which was had by the company in the premises.

The condition referred to reads in these words: "If, during the insurance, the risk is increased by the erection of buildings or by the use and occupation of neighboring premises, or otherwise, or if, for any other cause, the directors shall elect, it shall be optional with them to terminate this policy after notice given to the assured or representatives of their intention to do so. But in every case of termination of insurance the assured shall be bound to pay his or her proportion of assessments up to the day of actual cancellation of the policy on the books of said company."

On the 21st day of September, 1861, at a special meeting of the Board of Directors of this company, held at their office in St. Louis, Missouri, the following preamble and resolutions were unanimously adopted:

"Whereas, the rate of insurance fixed upon policies by this company was determined by the usual hazard occasioned by accidental fires, and not intended to cover losses occurring by incendiaries in time of civil commotion like the present; therefore be it resolved, that the secretary of the company is hereby instructed to notify all members holding policies outside of the county of St. Louis, that, owing to the great number of fires by means of incendiaries, this company, for the time being, and until after the settlement of the present difficulties of the country will discontinue risks under all policies issued on property outside of the county of St. Louis, in Missouri."

Under this preamble and resolution, the secretary, some time before the loss occurred, served on the plaintiff the following notice:

---

Landis v. Home Mut. Fire & Marine Ins. Co. of St. Louis.

---

OFFICE HOME MUTUAL F. & M. INS. CO., }  
ST. LOUIS, Sept. 21st, 1861. }

"TO MR. ISRAEL LANDIS :

At a meeting of the Board of Directors of the Home Mutual Fire and Marine Insurance Company held this day, the following preamble and resolution were adopted (then follow the preamble and resolution above copied). In accordance with the foregoing resolution, you are hereby notified that from and after the receipt of this notice or publication of the same, your policy No. 11,068, is hereby canceled, and the company will not be liable for any loss which may occur thereafter. By referring to the conditions of insurance forming part of your policy, you will see that the company has reserved the right to cancel the same for any cause satisfactory to the Board of Directors. On return of your policy your premium note will be surrendered.

By order of the Board of Directors.

T. L. SALISBURY, Secretary."

This was all the proof given or offered of any cancellation of the plaintiff's policy. There is no pretense that the resolution of the board of directors requiring the secretary to give notice to the policy holders of their intention to discontinue risks, was of itself a cancellation of plaintiff's policy.

This resolution was the first step taken in that direction under the conditions in the policy. The secretary had no power to cancel the policy by notice or otherwise. He was not directed by the resolution to give notice of a cancellation, for none had been made, but he was simply required to give notice of what had transpired before the board of directors. The board of directors could only cancel the policy by a strict compliance with the condition authorizing such cancellation. The condition required a previous notice to the plaintiff, and also, before any cancellation could have any effect, it was, by the terms of the condition, to be entered on the books of the company. Until such cancellation was so made upon the books of the company, neither party was bound. The language of that part of the condition is: "But in every case of

termination of insurance, the assured shall be bound to pay his or her proportion of the assessments up to the day of actual cancellation of the policy on the books of the company.' The evident meaning of this language is, that the proceedings commenced for cancellation are to remain *in fieri* and not to have full efficacy up to the day of actual cancellation on the books of the company. As the company retains its right to make assessments up to that day, the policy holder cannot be divested of the protection afforded his property by means of the policy, under which alone it can be assessed. There was no such compliance with the terms of this condition as to amount to a cancellation either express or implied. (See *Van Valsenburg vs. Lexington Ins. Co.*, [N. Y. Court of Appeals, Jan'y 1873], *Ins. Law Journ.*, March No. 1873, p. 205; *Lyman vs. State Mut. Fire Ins. Co.*, 14 Allen, 329; *Emmott vs. Slater etc., Ins. Co.*, 7 R. I., 562.)

In *Cain vs. Lancaster Ins. Co.* (27 Upper Canada Q. B. Rep., 217) so strongly relied on by appellant's counsel, the question arose on a demurrer to the plaintiff's plea, averring a cancellation of plaintiff's policy. The averment in the plea was, that the defendants gave notice to the plaintiff of their intention to cancel his policy, and did "thereby" terminate the insurance. The court said: "Now the only ground of objection would seem to be the introduction of the word 'thereby.'" Without it, the averment would be that they did terminate the risk. No particular way is provided in which the termination is to be effected or declared. All that is required is, to say they elected to terminate, gave notice, and did so terminate the contract." The court held the plea was a sufficient averment of a termination of the risk, and added in conclusion, "that the plaintiff could have readily replied to this any matter of fact by which he could escape the effect of the condition."

Whether the Queen's Bench decided rightly or wrongly, it is very manifest that this case is not parallel with that. In that there was no particular mode pointed out how the termina-

---

*Landis v. Home Mut. Fire & Marine Ins. Co. of St. Louis.*

---

tion of the risk was to be effected, but here the condition expressly requires the cancellation to be made after notice, on the books of the company, before it has any final efficacy. If there had been a replication, setting up the fact that the termination of the risk could only be made on the books of the company, that would have raised the question which is presented to this court for determination. I do not consider that case in point, and if it were, it ought not to control the action of this court, as there is no pretense that the condition in this policy authorizing a termination of the risk was complied with.

The next and only remaining point for our consideration is, that this action was barred by the limitation created by section ten of the charter of 1845, which was printed on the policy as a part thereof. That section substantially provides, "that in cases of loss, the injured party shall permit his claim to be adjusted and determined by the company as to the amount to be paid to him. If he is not satisfied with the adjustment, the question may be submitted to referees, or he may bring an action against the company for the loss or damage at the next court, to be holden in and for the county of St. Louis and State of Missouri, and not afterwards, unless said court shall be holden within sixty days after the determination; but if holden within that time, then at the next court holden in that county thereafter." (See Local Laws Sess. Acts 1845, p. 201.)

It is very obvious that the limitation referred to in this section, applies alone to cases where the company determines the amount to be paid, and the party is not satisfied with their adjustment. It has no application at all where the company claims a total exemption. In such case the assured may resort to his remedy under the general law and is only barred by the general Statute of Limitations. (*Boynton vs. Middlesex Mutual Fire Ins. Co.*, 4 Metc. [Mass.], 212; *Williams vs. N. Eng. Mut. F. Ins. Co.*, 29 Maine, 465.)

The case of *Keim vs. Home Mutual, &c., Ins. Co.* (42 Mo. 38) turned upon the construction of a new section introduced

---

Landis v. Home Mut. Fire & Marine Ins. Co. of St. Louis.

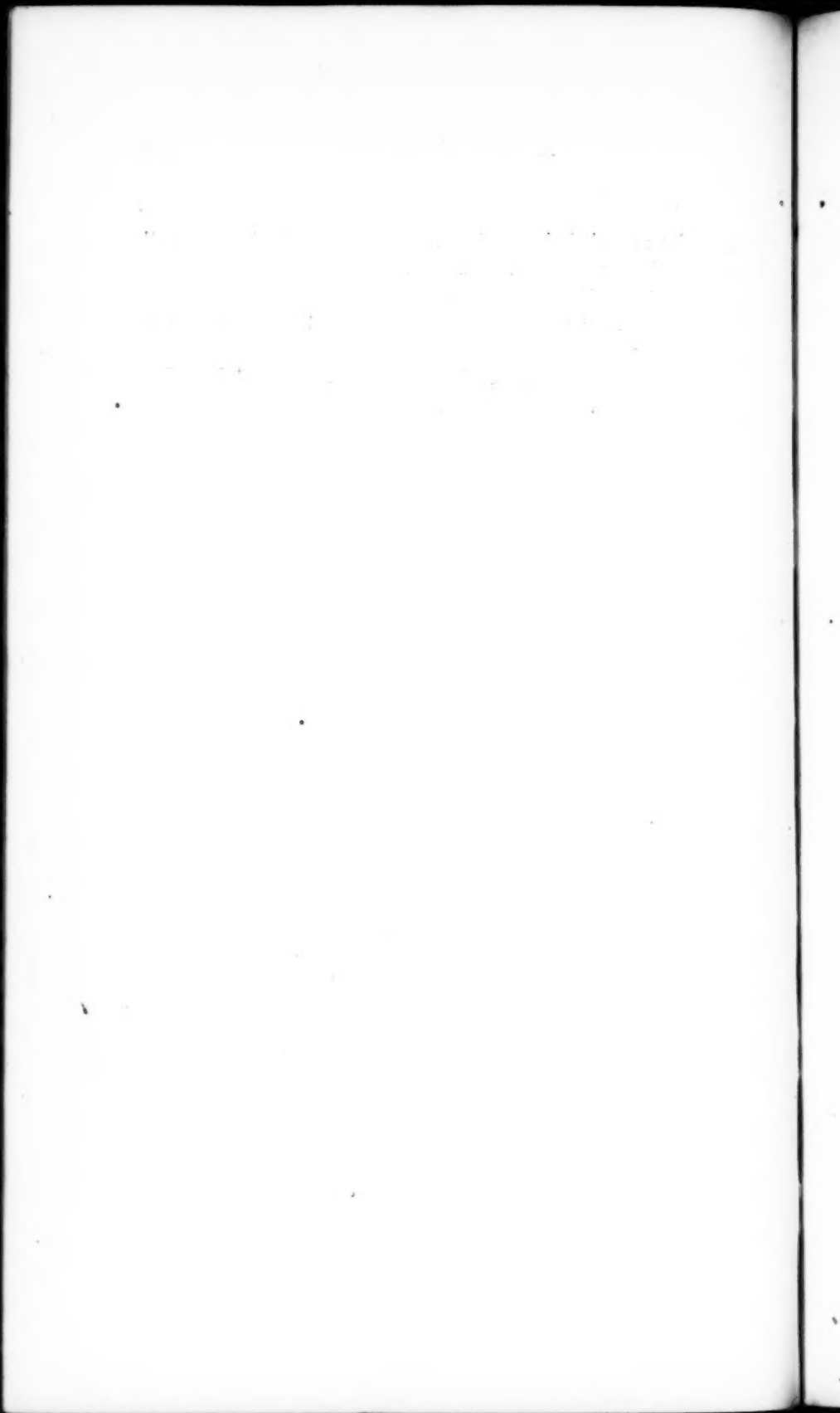
---

into the amended charter in 1857, which required suits in all cases to be brought within a certain limited time. Upon an examination of that case it will be found, that it has no application here, as the section renewed did not enter into or form a part of this policy.

Judgment affirmed. Judge Wagner absent. The other judges concur.

MARCH TERM, 1874 AT ST. LOUIS IS CONTINUED IN VOL. LVII.





---

Dorn, et al. v. Parsons, Adm'x.

---

A. J. DORN, *et al.*, Appellants, *vs.* SARAH PARSONS, Adm'x of  
B. PARSONS, Respondent.\*

1. *Notes—Possession—Ownership.*—The possession of a note, not payable to bearer, nor indorsed in blank by a third person, is not even *prima facie* evidence of ownership.

*Appeal from Newton Circuit Court.*

J. E. Vickery, for Appellants.

ADAMS, Judge, delivered the opinion of the court.

The plaintiffs presented to the Probate Court of Newton county a demand against the estate of Baldwin Parsons, deceased, for allowance. That court refused to allow the claim, and the plaintiffs appealed to the Circuit Court. The demand referred to was a note, which reads as follows:

"One day after date, I promise to pay N. A. Birkey, forty-four dollars and seventy cents, with interest at ten per cent. for value received, this 27th Dec. 1860.

"Signed,

BALDWIN PARSONS."

On the trial of the case, the plaintiffs offered evidence tending to show that Baldwin Parsons had executed the note; but gave no evidence whatever to prove their ownership of the note. They offered in evidence an affidavit which one of the plaintiffs had filed, to the effect that they had given the estate credit for all just payments and offsets to which it was entitled, and that the balance claimed was justly due. This affidavit was rejected, and plaintiffs excepted.

The court found for defendant, and disallowed the claim; and the plaintiffs filed a motion for a new trial, which was overruled.

There seems to be nothing in this case to justify this appeal. It is urged here, that there was no dispute as to the plaintiffs being the owners of the note, and that the note had been executed by Parsons to Birkey. The record does not bear out this assumption. There was no proof at all of ownership. The possession of a note payable to bearer, or indorsed in blank, would be *prima facie* evidence of ownership. But the possession of such a note as this is no evidence at all of ownership.

[\*This and the case following should have gone in on p. 45, but they were overlooked until too late.]

---

State v. Perrine.

---

I do not see upon what ground the affidavit was offered as evidence. Such an affidavit is not intended to be used as evidence; but is a pre-requisite required to be made before the court can allow the claim, or even hear any evidence at all in regard to it. An affidavit may be used for that purpose, or the oath of the claimant in open court. (1 Wagn. Stat., 103, § 12.)

Judgment affirmed. Judges Vories and Napton concur. Judges Wagner and Sherwood absent.

—o—

THE STATE OF MISSOURI, Respondent, *vs.* A. L. PERRINE, Admr.  
of estate of J. M. HALE, deceased, Appellant.

1. *Practice, criminal—Appeal—Death of defendant—Effect of.*—Where pending appeal taken upon a conviction for misdemeanor defendant dies, the suit cannot be revived against his administrator, but must abate and the appeal will be dismissed. (Wagn. Stat., p. 1114, § 12.)

*Appeal from Platte Circuit Court.*

John Doniphan, for Appellant.

WAGNER, Judge, delivered the opinion of the court.

James Hale was indicted for a misdemeanor, in selling liquor without a license. Upon a trial he was convicted and appealed to this court. Pending the appeal he died, and the case has been revived in the name of his administrator, who is now made a party to the record. We know of no law continuing a prosecution against a dead man. The statute provides, that when an appeal or writ of error shall be prosecuted from the judgment, in a case of misdemeanor, the recognizance shall be conditioned, that the defendant shall appear in the court in which the judgment was rendered, at such time and place as the Supreme Court shall direct, and that he will render himself in execution, and obey every order and judgment which shall be made in the premises. (Wagn. Stat., 1114, § 12.)

When the party is dead it is impossible for him to comply with the stipulations of the bond, or obey the mandate of the court. The case was thereby necessarily abated, and it must be dismissed. All the judges concurring.

## INDEX.

---

### ACCOUNT STATED.

1. *Account stated—Opened how—Bill must allege what.*—A settlement can be opened only on the ground of fraud, error or mistake. And the proceeding for that purpose must specifically set forth such ground.—*Kronenberger v. Binz*, 121.
2. *Settlement—Time of payment extended—Notes given, etc.*—The amount ascertained by a settlement becomes due from the date thereof; and where by the terms of the settlement the debtor agrees to give his note payable at a day named for the amount found to be due, but fails to give the same, the debt accrues immediately.—*Id.*

ACKNOWLEDGMENT, see Husband and Wife, 6, 7.

ADJOINING PROPRIETORS, see Land and Land Titles, 13.

### ADMINISTRATION.

1. *Administrator must determine for himself whether fund belongs to estate of deceased—Parol evidence, when proper, etc.*—An agent credited to the account of the husband, the proceeds derived from the sale of certain lands belonging to the wife and turned the sum over to the administrator of the husband, *Held*, that the administrator properly refused to be governed by the books of the agent, and was right in not charging himself with that amount. He was authorized to determine for himself to what fund it belonged. And the fact might be shown by parol evidence.—*Pattison, Adm'r, v. Coons*, 169.
2. *Probate Court—Administrator—Embezzlement, trial for—Judgment will authorize appeal.*—In a proceeding before the Probate Court against an administrator, charging him with concealing and embezzling the assets of the estate. (See Wagn. Stat., p. 85, §§ 7, 8, 10,) judgment on the merits would be a final one, as contemplated by the statute, so as to authorize an appeal to the Circuit Court.—*Ruff v. Doyle*, 301.
3. *Probate Court—Administration—Assignment of claim—Error in, corrected nunc pro tunc, when—Injunction—Equity, etc.*—A clerk of probate being misled by an erroneous memorandum of the judge, assigned the claim of A, which properly belonged to the 6th class in an administrator's settlement, to the 5th class, thereby causing said claim to be paid, and sacrificing others of the 6th class.  
A creditor of the 6th class at a term subsequent to the erroneous assignment brought suit against A and the administrator, to enjoin A from proceeding to enforce his claim and to compel the administrator to assign said claim to the proper class:

## ADMINISTRATION, continued.

- Held*: 1st, that the remedy of plaintiff was by a motion in the Probate Court to correct the error *nunc pro tunc* and not by injunction; 2nd, that although plaintiff was ignorant and A. was aware of the mistake at the term wherein it occurred, and during which appeal would lie to remedy it, yet there being no relation of trust between A. and the plaintiff requiring a disclosure of the facts, and no trick or artifice to produce or conceal the mistake being shown, plaintiff had, as against A., no equity on this ground.—Jillett, et al. v. U. Nat. Bank, et al., 304.
4. *Administration—Practice, civil—Parties—Action on administrator's bond—Distributees may sue jointly, before order of distribution.*—Before an order of distribution is made, those entitled to distribution have a common interest in the fund, and in an action against the sureties on the administrator's bond they may properly be joined as plaintiffs to prevent a multiplicity of suits.—Kelley v. Thornton, et al., 325.
5. *Administrator's bond—Sureties—Distributees may maintain action before final settlement.*—Where the administrator has failed to distribute funds in his hands according to law and has been removed, where there are no debts due by the estate persons entitled to distribution may bring suit on the administrator's bond without the appointment of an administrator *de bonis non* and before a final settlement.—Id.
6. *Wills—Extra-territorial operations of—Responsibility of executor.*—So far as realty is concerned, a will has no extra-territorial force, and the executor cannot sue for, or in anywise intermeddle with, property of his testator, real or personal, in another State, unless the will be there proven, or the laws of such States, dispensing with the probate anew, confer the requisite jurisdiction; and hence, where no such provisions prevail, he cannot be held liable on his bond as executor, for his acts done in another State. Whether he might not be chargeable as trustee for misapplication of funds received in another State, not passed on by the court.—Cabanne, et al. v. Skinker, Ex'r of Forsyth, et al., 357.
7. *Administration—Real estate, sales of—Deeds, description in—Sheriff's sales.*—A sale of real estate by an administrator is *in invitum* as to the heirs, who are the real owners. He exercises a statutory power under the orders of the Probate Court, and the principles which apply to sheriffs' sales as to the description of the property to be sold, apply to administrators' sales.—Jones, et al. v. Carter, 403.
8. *Administrator—Real estate, sales of—Conveyance—Indefiniteness of description of land.*—In a deed to real estate made by an administrator, he described the land as 320 acres of land, "being parts of lots No. 6 and 12." In reality, lot 6 contained 173 acres and lot 12, 574 acres. *Held*, that the deed was void for uncertainty in the description.—Id.
9. *Wills—Contests touching—Administrator—Functions suspended—Appointment of administrator pendente lite—Construction of statute.*—Where proceedings are commenced in the Circuit Court under the statute (Wagn. Stat., 1368, § 29), to contest the validity of a will, the Probate Court is authorized by virtue of § 13, of the Administration Act, (Wagn. Stat., p. 72,) to suspend the functions of the executor or administrator, and to appoint a temporary administrator *pendente lite*. The latter section was enacted mainly, if not solely, in view of proceedings authorized by the statute touching wills.
- This authority to suspend and supersede during the contest applies not merely to the case of an executor named in the will, but is broad enough to reach that of an administrator with the will annexed, who derives his power solely from appointment by the Probate Court.—Lamb, Adm'r v. Helm, Adm'r, 420.
10. *Executors—Powers derived chiefly from appointment.*—The power of an executor under our law to act as such is derived, not so much from the will of the testator as, from the appointment of the court and a compliance with the law.—Lamb, Adm'r v. Helm, Adm'r, 420.
11. *Administration—Section 13 of act—Words "other person"—Construction of.*—Section 13 of the Administration law (Wagn. Stat., p. 72,) provides that "if the validity of a will be contested or the executor be a minor or absent from

## ADMINISTRATION, continued.

the State, letters shall be granted during the time of such contest, minority or absence, to some other person." *Held*, that a proper construction of the words "other person" would seem to be that a person other than, or different from the one charged with the execution of the will—whether named in the will or not—shall be appointed to take charge of the estate during the contest.—*Lamb, Adm'r v. Helm, Adm'r*, 420.

12. *Administration—Bond—Sureties—Additional—Release of former.*—The security contemplated by the 41st section of the Administration Law, is additional to that previously given, and does not have the effect of releasing the former sureties. The 39th section applies to an entirely different case, and does not apply to that contemplated by the 41st section. (*State ex rel., Glenn vs. Wright's Adm., 53 Mo., 479, affirmed.*)—*Haskell v. Farrar, et al.*, 497.

See Wills.

ADMISSIONS, see Engineer, 1; Conveyances 1; Practice, civil pleadings, 1.

ADULTERY, see Criminal Law, 1.

ADVERSE POSSESSION, see Ejectment.

## AGENCY.

1. *Business commissions of clerk—Power of attorney—Conversion of funds drawn under—Borrowed money—Interest on, etc.*—In suit by a clerk for a proportion of the business profits, guaranteed to him by defendant, where it appeared that the latter had employed a third party to transact business for him in his absence, and that without the consent of plaintiff he had given him power of attorney to draw money, execute notes, etc., in defendant's name; *semble*, that money so taken out of the business by said third person, and not accounted for, could not be charged to the profit and loss account of the concern, but should be borne by the defendant personally. *Held*, also, that plaintiff not being required to furnish any part of the capital, defendant could not charge against plaintiff an *aliquot* portion of the interest upon funds borrowed by defendant to carry on the business.—*Edwardson v. Garnhart*, 81.
2. *Banks—Draft forwarded to defaulting correspondent—Responsibility of bank to owner—Measure of.*—Where a bank in this State receives for collection a draft payable in another State, and uses due diligence and forwards the draft to a proper correspondent at the place where the paper is made payable, with proper instructions for collection, its responsibility is at an end; and in case of default by its correspondent, it cannot be held liable to the owner, unless by some after act it makes itself responsible.—*Daly v. Butchers' & Drovers' Bank*, 94.
3. *Agent—Powers—Sale and payments.*—A power to sell goods includes a power to receive payment.—*Rice, et al. v. Groffman*, 435.
4. *Agency—Authority—Mistake, party causing should suffer consequent loss.*—Where a party has so acted, that another is led to believe in the right of a third person to act as his agent, if any loss occurs by reason of any act of the supposed agent, the loss must fall on him whose conduct caused the mistake.—*Id.*
5. *Contracts—Agency—Fraud—Deed of trust—Sale under—Purchase of trust property by agent of cestui que trust.*—An agreement between a purchaser, and a person acting as agent for both the *cestui que trust* and the vendee, under which the vendee and agent were to purchase in the name of the vendee for their joint benefit the property sold under a deed of trust, without making it bring the amount of the debt secured, when the property sold was of a value much greater than the amount of the debt, would be fraudulent, and would not be upheld by the courts.—*Longuemare v. Busby*, 540.

See Insurance, fire, 2; Frauds, statute of, 2; Partnership, 2.

AMENDMENTS, see Administration, 3; Judgment, 1; Practice, civil, 1; Practice, civil, pleading, 3.

ANDREW COUNTY, see Bonds, Andrew Co.



## APPEAL.

1. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed to set aside the order granting the appeal, and then grant a new trial.—Kingman, et al. v. Abington, et al., 46.
2. *Justices' courts—Appeal—Sureties—Non-suit.*—Where defendant appealed from the judgment of a justice, and in the Circuit Court plaintiff took a voluntary non-suit, which was afterwards set aside without the knowledge or consent of the sureties on the appeal bond, and plaintiff had judgment against defendant and his sureties. *Held*, that the sureties were bound by the judgment.—Bailey v. Rosenthal, 385.

See Administration, 3; Costs, 1.

APPORTIONMENT, see Contracts, 5.

ARBITRATION AND AWARD, see Referee.

## ATTACHMENT.

1. *Malicious attachment—Action for damages for—Participation of defendant in levy not necessary to.*—It is not necessary to the maintenance of an action for malicious attachment that defendant should have participated in the execution of the attachment process. If he makes out the affidavit maliciously, vexatiously and without probable cause, this is sufficient, without proof of further intervention on his part, to render him liable in damages for any resulting injury.—Walser v. Thies, 89.
  2. *Malicious attachment, action for—Malice—Probable cause.*—In suit for malicious attachment, malice need not be expressly proved, but may be inferred from want of probable cause. And notwithstanding proof of probable cause for attachment, if from bad or malicious motives, oppressive and vexatious litigation is carried on, the action for damages will lie.—Id.
  3. *Malicious attachment—Exemplary damages.*—In suit for malicious attachment, exemplary damages may be awarded.—Id.
  4. *Malicious attachment and prosecution—Rules as to damages.*—The rules as to damages applicable to cases of malicious prosecution apply to actions for malicious attachment.—Id.
  5. *Attachment—Plaintiff's bond may be sued on without plea in abatement—Damages for detention of money by garnishee.*—Under the statute of 1865, (Wagn. Stat., p. 189, § 42,) defendant in a suit by attachment, in case of judgment in his favor on the merits, may sue on the plaintiff's attachment bond, without having entered his plea in abatement. (State to use of Roe vs. Thomas, 19 Mo., 613.)
- In such suit he may recover damages growing out of the detention by garnishment of money due him, not exceeding of course the legal rate of interest.—State v. Beldsmeier, et al., 226.

See Landlord and Tenant, 7; Garnishment.

## ATTORNEY.

1. *Attorney—Power of to compromise claim.*—An attorney has no authority arising from his employment in that capacity, to compromise the claim of his client.—Spears vs. Ledergerber, 465.

AUCTIONEER, see Frauds, statute of, 2.

## B.

## BANKS AND BANKING.

1. *Banks—Draft forwarded to defaulting correspondent—Responsibility of bank to owner—Measure of.*—Where a bank in this State receives for collection a draft payable in another State, and uses due diligence and forwards the draft to a proper correspondent at the place where the paper is made payable, with proper instructions for collection, its responsibility is at an end; and in case of default by its correspondent, it cannot be held liable to the owner, unless by some after act it makes itself responsible.—Daley v. Butchers' and Drovers' Bank, 94.

See Revenue, 1.

## BANKRUPTCY.

1. *Nat. bankr. law—Composition, what invalid.—Semble*, that an agreement, by which one creditor obtains seventy-five per cent. of his own claim, and agrees only to secure to other creditors 30 per cent., would be a violation of the national bankrupt law, and would not be enforced here any more than in the courts having special jurisdiction in bankrupt cases.—*Claffin et al. v. Torlina, et al.*, 360.
2. *Mechanics' liens—Bankrupt act of the United States.—It* was not intended by the United States Bankrupt Law to cut off or destroy liens or vested rights acquired under State laws, but rather to preserve all liens and enforce a distribution of the property of the bankrupt with reference to the rights of all, whether those rights were created by a statutory lien or otherwise. And a person entitled to a mechanic's lien under the laws of this State, has a right, notwithstanding the commencement of proceedings in bankruptcy, to perform all acts necessary to the final prosecution and perfection of his lien under the statutes of this State.—*Douglas v. St. L. Zinc Co., et al.*, 388.
3. *Mechanics' liens—Bankruptcy—Jurisdiction.—When* the property of a bankrupt under the United States Bankrupt Law is subject to a mechanic's lien, the bankrupt court may order the assignee to sell the property and pay off the lien out of the proceeds, or may order the property to be sold subject to the lien, and in that case the courts of the State whose statute gives the lien would have jurisdiction to ascertain and enforce the lien against the property, notwithstanding the proceedings in bankruptcy.—*Id.*

## BILLS AND NOTES.

1. *Notes—Surrender, etc.—Consideration.—The* surrender and cancellation of a note is a sufficient consideration for another given in lieu thereof.—*Meyers v. Van Wagoner*, 115.
2. *Promissory notes—Deed of composition—Estoppel—Trust note.—In* an action by the holder against the indorser of a promissory note, where it appeared that the maker had entered into a deed of composition and release with his creditors, and that plaintiff had accepted its provisions, and nothing on the face of the note showed that it was held by plaintiff in trust, and it was treated by him as his individual property, he is estopped, so far as the maker is concerned, from after claiming that he held the note as guardian.—*Eggemann v. Henschen*, 123.
3. *Promissory note—Deed of release as to maker—Release of subsequent indorser.—Where* the holder of a note releases the maker, such release operates as a discharge of the indorser, and the fact that he assents to the release does not alter the case.—*Id.*
4. *Promissory Notes—Purchase after dishonor—Defenses, etc.—The* purchaser of a note after maturity takes it subject to all existing and prior equities.—*Kellogg v. Schnaake*, 137.
5. *Promissory note—Defense—Failure of consideration.—An* answer to a suit on a note which admits its execution, but alleges that it was "without any consideration whatever," sets up a good defense.—*Williams v. Meillon*, 262.
6. *Bills and notes—Holder for value before maturity presumed to be an innocent holder—Consideration, when can be impeached.—The* indorsee of negotiable paper for value before maturity is presumed to be an innocent holder, and must be so treated in the absence of proof to the contrary; and without such proof no evidence is admissible to impeach the consideration.—*Greer v. Yosti*, 307.
7. *Bills and notes—Consideration, what sufficient notice of fraud.—The* notice of fraud must be at least sufficient to put the purchaser on inquiry. Express notice is not indispensable; it will be sufficient if the circumstances are such as to strongly indicate that there was fraud in procuring the paper; but the circumstances must be of such a strong and pointed character as necessarily to cast a shade on the transaction and to put the holder on inquiry.—*Id.*
8. *Bills and notes—Innocent holder—Consideration.—A* negotiable note in the hands of an innocent purchaser for value before maturity is protected from all inquiry into the consideration.—*Bennett, et al. v. Torlina, et al.*, 309.

## BILLS AND NOTES, continued.

9. *Bill in equity to set aside sale of land made during rebellion for non-payment of note.*—During the late rebellion, citizens residing in the rebel states were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Thus, where, after the President's proclamation of August, 1861, a note having been dishonored, certain land given under deed of trust to secure it was sold to satisfy the debt, a bill in equity will not lie on behalf of the maker to set aside the sale, on the ground that the plaintiff was, when the note matured and the land was sold, within the Confederate lines and cut off from all intercourse with the loyal States: it further appearing, that the plaintiff had voluntarily gone and remained South. The doctrine of *Dean vs. Nelson*, (10 Wall., 158,) has no application to such a case.

*Held* further, that the trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the maker of the note.

Failure of notice to him, or even his previous death, would not invalidate the sale. The notice required by statute was not intended to apprise the grantor in the deed of the sale of the land.—*DeJarnette v. DeGiverville*, et al. 440.

10. *Note—Deed of trust—Sale under during war—Equity will interpose.*—During the late war, the citizens of the rebel States being alien enemies were subject to the laws of nations, under which one residing in the South would be prohibited from paying a note which fell due in the loyal States during that period. Hence, default in its payment under such circumstances would not authorize the sale of land given under deed of trust to secure it, and equity would interpose to set aside the sale.

The note and deed of trust must be construed as made subject to the implied power of the governments to which the parties belong, to interfere with or suspend it "*flagrante bello*." *PER NORTON, J., DISSSENTING.*—*DeJarnette v. DeGiverville*, et al. 440.

11. *Bills and Notes—Protest—Due diligence—Excuse for failure to protest.*—The question whether the maker of a promissory note had left his place of residence so that a demand of payment could not be made there; or whether he had a place of business in the city where he resided, where such demand could be made, are questions of fact for the jury.—*Bartholow, et al. v. Barnard*, et al. 550.

12. *Notes—Possession—Ownership.*—The possession of a note, not payable to bearer, nor indorsed in blank by a third person, is not even *prima facie* evidence of ownership.—*Dorn v. Parsons*, 601.

See Account Stated, 2; Husband and Wife, 2; Judgments, 9; Mortgages and Deeds of Trust, 3.

## BILL OF PEACE.

1. *Land and land titles—Equity—Bill of Peace.*—Where the correctness of a particular boundary line between two tracts of land has been thoroughly and satisfactorily tried in a number of actions, extending through a considerable time, and the verdict and judgment have always been in favor of the correctness of such boundary; equitable relief will be properly granted at the instance of the persons maintaining the correctness of said boundary, by enjoining its assailants from further vexing and harrassing those asserting it by a suit at law; and this, even if the said actions so tried did not involve the same pieces of ground; provided they involve the same boundary and were between the same parties or their privies in estate.—*Primm, et al. v. Raboteau*, 407.

2. *Equity—Bill of peace—Boundary.*—Where a court of equity grants relief in response to the prayer of a pleading in the nature of a bill of peace it may effectuate its decree in their behalf, by requiring a disputed boundary to be surveyed and marked in a permanent manner.—*Id.*

BONDS, see Attachment, 5; Administration, 4, 5, 12; Mechanic's Lien, 7.

## BONDS, ANDREW COUNTY.

1. *County railroad bonds—Andrew county—Interest on bonds, what lawful.*—In January, 1860, by the general law then in force, the county had power to issue bonds for the Platte County Railroad Company, bearing interest at the rate of ten per cent. These bonds were not governed by § 33 of the statute touching Railroads (R. C. 1855, p. 429), limiting the interest to seven per cent. That section referred to special cases contemplated by § 31 of same act. The bonds of Andrew county were issued under different circumstances and a distinct and independent grant of power; and as no limitation was therein imposed as to the interest, it was competent to fix any rate of interest not prohibited by law.—*Beattie v. Andrew County*, 42.

BONDS, COUNTY, see Macon County.

BOUNDARIES, see Land and Land Titles, 11, 12.

BURDEN OF PROOF, see Wills, 2, 5.

BURGLARY, see Practice, criminal, 1.

## C.

CHECK, see Revenue, 1.

CITY, see St. Louis, City of.

CLERK OF COUNTY, see Officers, 1.

COLOR OF TITLE, see Land and Land titles, 7.

## COMMON CARRIERS.

1. *Common carriers—Liability for disposition of goods at the end of their line—Due diligence.*—Goods designed to be delivered at Vicksburg, Miss., were delivered at New York to a common carrier whose line extended only to St. Louis and were receipted for by the carrier, as shipped "via. St. Louis, care of St. Louis & Vicksburg Packet Co., for A. B. & Co., Vicksburg, Miss." At the time of the arrival of the goods at St. Louis, there was no company or person in existence in St. Louis, or having an office or place of business there under the name of the St. Louis & Vicksburg Packet Co. The carrier thereupon, shipped the goods on a first class steamer on which it was usual and customary to ship goods from St. Louis to Vicksburg. The steamer was sunk on her way down and the goods partly lost, partly damaged and all detained. On suit against the carrier for such loss, damage and detention, *Held*, that it was proper for the carrier, having carried the goods to St. Louis, to store them or to forward them at once, as might be most expedient, regard being had to the nature of the goods, and that having, in the exercise of a sound discretion, forwarded them by a usual mode of transportation, the carrier's liability ceased.—*Cramer, et al. v. Am. U. Ex. Co. & The Mer. Dispatch Co.*, 524.
2. *Common carriers—Forwarders—Notice to consignors or owners.*—A carrier who receives goods, as such, and forwards them to their destination from the end of his line in the exercise of a sound discretion, cannot be held responsible for want of notice of his action to the owner or consignor. Such responsibility would grow out of his duty as a forwarder, and could not be set up in a suit brought against him simply as a carrier.—*Id.*

COMMISSION MERCHANT, see Contracts, 2.

COMPROMISE, see Bankruptcy, 1.

CONFIRMATION, see Land and Land Titles, 5.

CONSIDERATION, see Bills and Notes, 1, 5, 6, 7, 8.

CONSIGNOR, see Common Carrier.

CONSTABLE, see Execution, 2.

CONSTITUTION OF MISSOURI, see Officers, 1.

CONTINUANCE, see Practice, civil, trials, 1; Practice civil, 3, 4; Referee, 1.

## CONTRACTS.

1. *Waiver*.—Although in an agreement time is made of the essence of contract, still it may be waived by a subsequent understanding between the parties.—*Estel, et al. v. St. L. & S. E. R. R. Co.*, 282.
2. *Contracts—Factors—Commission merchants—Rights of—Advances*.—Where merchandize is consigned to a commission merchant to be held and disposed of on account of the consignor, without any specific orders as to time and mode of sale, and the consignee makes advances or incurs liabilities on the consignment for the benefit of the consignor, the legal presumption is, that the consignee is clothed with the ordinary right of factors to sell, in the exercise of a sound discretion, at such time and in such a manner as the usage of trade and his general duty require, and to re-imburse himself for his liabilities out of proceeds of the sale; and the consignor has no right by subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale except so far as respects any surplus not necessary for the re-imbursement of such advances or liabilities. And where the consignee has called upon the consignor to advance to him a sufficient sum to indemnify him against loss, and the consignor has failed to do so, the consignee has the undoubted right, in the exercise of a sound discretion to sell so much as is necessary for his protection, at the current rates; even though such sale be made at a lower rate than demanded by the consignor.—*Howard, et al. v. Smith*, 314.
3. *Contracts—Parol, additional to a written contract—Evidence*.—A contract was made in writing for the transportation of certain troops and officers, which did not expressly provide for their subsistence. *Held*, that a subsequent parol agreement fixing a price for such subsistence, was independent of and not inconsistent with such contract, and that evidence was admissible to prove it.—*Van Studdiford, Trustee, v. Hazlett*, 322.
4. *Contracts—Action for breach of—Evidence not admissible to show a different breach from that set up*.—Where suit is brought for damages for a specified breach of contract, evidence of a different and additional breach is not admissible.—*Huston v. Forsyth Scale Works*, 416.
5. *Contracts—Apportionment—Divisibility—Quantum meruit*.—A contractor who fails to comply with his contract, loses whatever damages such failure may occasion, and is not allowed, under any circumstances, to claim beyond the contract price; and at the same time, after deducting such damages and such as result from any inferiority of the work or materials to what is required by the contract, he is entitled to be paid for what his labor and materials are reasonably worth to the party using them; and this allowance is not based upon the contract by any theory of waiver by acceptance, but on the idea that the work is of value, and should be paid for. If there is no value there can be no recovery.—*Yeats, et al. v. Ballentine*, 530.
6. *Contracts—Breach of—Acceptance of work—Waiver, what will amount to*.—Where work and labor and materials have been expended in the production of an article not connected in any way with property belonging to the party at whose instance the work has been done, the latter is at liberty to accept it or not, and if he does accept, such acceptance is a waiver of any defense to the contract, based upon any defects in its performance. But where the work is done on property of the other party, so that its results cannot be separated from the necessary consequences of ownership, as work done on another's house or farm, the continued possession and use of such property by the owner is not a waiver of any such defense.—*Id.*
7. *Contracts—Agency—Fraud—Deed of trust—Sale under—Purchase of trust property by agent of cestui que trust*.—An agreement between a purchaser and a person acting as agent for both the *cestui que trust* and the vendee, under which the vendee and agent were to purchase in the name of the vendee for their joint benefit the property sold under a deed of trust, without making it bring the amount of the debt secured, when the property sold was of a value much greater than the amount of the debt, would be fraudulent, and would not be upheld by the courts.—*Longuemare v. Busby*, 540.

See Conveyance, 2; Frauds, statute of, 1; Guaranty, 1, 2; Infants, 2; Judgment, 2.

CONTRACTOR, see Damages, 3; Corporations, 1; Husband and Wife, 10, 11, 12;  
Insurance, fire; Insurance, life; Partnership, 2.

CONVERSION; See Agency.

CONVEYANCES.

1. *Conveyances—Cotemporaneous declarations.*—The declarations of parties made at the time of executing a deed and showing the intention of the parties in making it, may be competent, where the testimony does not involve the construction of the instrument.—*Huth v. Carondelet M. R. & Dock Co.*, 202.
2. *Infant—Conveyance by—Acquiescence in after majority—How long necessary to work affirmation of deed.*—Where one who has made a conveyance during infancy, after becoming of age, does some act which is totally inconsistent with an intention to disaffirm, as receiving rent on a lease made in his infancy, after he becomes of age, an affirmation may be inferred from such act without regard to the lapse of time which has intervened after majority. But mere silence or inaction will not have the effect of a disaffirmance unless continued so long after attaining majority as to work a bar under the statute of limitations.—*Id.*
3. *Administrator—Real estate, sales of—Conveyance—Indefiniteness of description of land.*—In a deed to real estate made by an administrator, he described the land as 320 acres of land, "being parts of lots No. 6 and 12." In reality lot 6 contained 173 acres, and lot 12, 374 acres. *Held*, that the deed was void for uncertainty in the description.—*Jones, et al. v. Carter*, 403.

See Administration, 7; Fraudulent Conveyances; Husband & Wife, 5, 6, 7  
10; Land & Land Titles; Sheriff's Sale, 1, 2.

CORPORATIONS.

1. *Corporations, municipal—Sewers—Private property—Contracts—City Officers, authority of.*—The route of a sewer in the city of St. Louis, as established by ordinance, ran through the private property of an individual, who objected to its being laid there, and was unwilling to pay for it. Thereupon, the chairman of the sewer committee of the city council, the superintendent of sewers, and the city engineer agreed with him that if he would dedicate the portion of his land necessary for the construction of the sewer, the time of payment on his part would be extended for three years, and upon this agreement the dedication was made, and the work proceeded. Suit was brought by the contractor for the work, against the owner of the land so dedicated, within a year after the work was completed. *Held*, that, as the sewer ran through the private land of defendant, the city manifestly had no right to proceed till the same was condemned, or the owner's consent or relinquishment was obtained; therefore the agreement was valid and binding upon the parties, and constituted the only terms upon which the city had any authority for using the land; and although no special authorization of the officers to make such contract was shown, yet as a corporation acts only through its officers, and as these officers were charged with the specific power of constructing and superintending sewers, and the city availed itself of the benefit of their acts, a ratification would be presumed. The contractor had no rights against the defendant under illegal proceedings, and as the right of way was relinquished on certain conditions, his rights were subject to those conditions, and he had no right to bring his suit until the three years had expired.—*St. Louis v. Lancaster*, 298.
2. *Insurance, life—Capital Stock—Taxation, what property subject to.*—Section 40 of the act touching life insurance, (Wagn. Stat., 752) provides that the payment of certain fees by the respective companies, shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid up capital stock the same as other property in the county, for county and municipal purposes." *Held*, that this provision, properly construed, did not prevent the taxation of other property owned by the companies, over and above the par value of their capital stock. Such is not double taxation. But the non-taxation of such property would amount to an exemption, in violation of the State Constitution. (See *Life Association of America vs. Board of Assessors*, etc., 49 Mo., 512.)—*St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County*, et al., 503.

See Insurance, Fire, 4; Insurance, Life; Macon County, 1.



**CORPORATIONS, MUNICIPAL,** See Corporations, 1; St. Louis, & City of; Streets, 1.

**COSTS.**

1. *Judgment for costs a final judgment.*—Where a suit is dismissed, judgment against plaintiff for costs is a final judgment from which appeal will lie.—*O'Connor v. Koch*, 253.

**COUNTER CLAIM,** See Mechanic's Lien, 7; Practice, civil, trials, 1.

**COURTS, ST. LOUIS CIRCUIT.**

1. *St. Louis Circuit Court—Writ of error to General Term.*—Under the statute and the rules of court provided in pursuance thereof, a writ of error will lie from a final judgment of the Circuit Court of St. Louis County in special term, to the general term of that court.—*St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County, et al.*, 503.

**COURTS, COUNTY,** See Macon County, 2; Officers, 1.

**COURT, PROBATE,** See Administration, 2, 3; Wills.

**CRIMINAL LAW.**

1. *Criminal law—Open and notorious adultery—What constitutes.*—Persons in order to be guilty of living together in open and notorious adultery, as meant by the statute (Wagn. Stat., p. 500, § 8), must reside together publicly, in the face of society, as if the conjugal relation subsisted between them, and their illicit intercourse must be habitual and not occasional.—*State v. Crowner*, 147.  
See Practice, Criminal.

**CRIMES & PUNISHMENTS,** See Administration, 2; Macon County, 1.

**CROPS,** See Landlord & Tenant, 6, 7.

**D.**

**DAMAGES.**

1. *Damages, excessive—Intervention of Supreme Court.*—Before the Supreme Court can interfere on the ground of excessive damages it must appear that manifest injustice has been done.—*Walser v. Thies*, 89.
2. *Negligence, immediate and proximate cause of injury—Recovery in case of, negligence of plaintiff; of both parties.*—No one can recover for an injury of which his own negligence in part or in whole was the immediate and proximate cause. Where the negligence of both parties was the proximate cause, neither can recover.—*Schaabs v. Woodburn Sarven Wheel Co.*, 173.
3. *Damages caused by falling of building while being re-built—Liability of owner and contractor.*—In suit for injuries received by an employee in making alterations in, and additions to, an old building; where the damages were shown to have resulted from inherent defects in the old wall, which the contractors were directed to make use of in the new building, or where the removal of floors and the construction of new walls were accomplished under the direction of defendant previous to the letting of the work to the contractors, and so unskillfully or negligently arranged as to have caused the injuries complained of, defendant will be liable, although at the time of the casualty the work had been let out to a contractor and was being carried on under his management and control.—*Horner, Adm'r, v. Nicholson*, 220.
4. *Railroads—Damages—Negligence, contributory.*—Although one injured by a railroad collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet if the accident was directly caused by negligence of the company, the latter will be liable.—*Burham v. St. L. & I. M. R.*, 338.

See Attachment, 1, 3, 4; St. Louis, 1, 2; Streets, 1.

**DESCRIPTION,** see Ejectment, 2; Estoppel, 4; Land and Land Titles, 11; Sheriff's Sales, 1, 2.

**DEED OF TRUST,** see Mortgages and Deeds of Trust; Trusts and Trustees.

DEDICATION TO PUBLIC USE, see Land and Land Titles, 2.

DEFAULT, see Judgment, 6.

DILIGENCE, see Bills and Notes, 11; Common Carriers, 1, 2; Practice, civil, New Trials, 4.

**DIVORCE.**

1. *Divorce—Desertion—Failure of husband to provide place of residence.*—The wife is bound to follow the fortunes of her husband, and live where he chooses to live and in the style and manner which he may adopt; and where a husband sues for a divorce on the ground of desertion, based on the fact that his wife remained away from him and refused his request that she should come and live with him, it is no defense, that at the time of such request he had no house to take her to, and that she was comfortably situated where she was.—*Messenger v. Messenger*, 329.
2. *Divorce—Desertion—Offer to return—Must be made in good faith.*—Where suit is brought for divorce upon the ground of desertion, an offer made by defendant to live with plaintiff is not sufficient to contradict the charge of desertion, unless made in good faith for the purpose expressed, and not as a device to defeat plaintiff's action.—*Id.*
3. *Divorce—Infants—Care and custody.*—A divorce was granted to the father and against the mother of young female children; the mother was entirely able and competent to take care of them, and bring them up, and educate them; *Held*, that although the law generally gives the father the care of such children, they should properly be left with the mother with a view to the best interests of the children. *Ordered*, that the mother should have the care and custody of the children until the further orders of the court.—*Messenger v. Messenger*, 329.

DOWER, see Husband and Wife, 8.

**E.**

**EJECTMENT.**

1. *Ejectment—Statute of Limitations—Possession for period of—Patent need not be proved, when.*—Possession of land in the owner or his grantors for more than thirty years accompanied with a claim of right, establishes a title which will warrant a recovery in ejectment, unless defeated by a better title set up by defendant. It is unnecessary in such case to go further and show title from the United States, where the Government is no party to the suit.—*Davis v. Thompson*, 39.
2. *Ejectment—False demonstration.*—In a suit in ejectment, it appeared that "A" had obtained a concession of certain lands in New Madrid from Baron De Carondelet, that he conveyed to plaintiff's grantor all his lot or lots in the town of New Madrid, which were at any time granted to him by the commandant of that place. *Held*, that in the absence of any extrinsic evidence showing that he was not the owner of another lot in New Madrid in addition to the above concession and granted by the commandant, the words "which were at any time granted to him by the commandant of the place," could not be rejected as a false demonstration in order to show that the same land passed by both grants.—*Gitt v. Eppler*, 139.
3. *Ejectment—Disputed boundary lines—Whether covered by certain deeds, question for jury.*—In ejectment for land between disputed boundary lines, the question whether a deed under which plaintiff claimed covered the strip in controversy was held to be one of fact for the jury.—*Barry v. Otto*, 177. See Estoppel, 2.

**ELECTION.**

1. *Elections—Official returns—Governor and Secretary of State cannot go behind.*—In counting votes for a Circuit Judge, neither the Governor nor the Secretary of State have any authority to go behind the returns officially certified to the Secretary.—*State v. Townsley*, 107.
2. *Quo warranto—Circuit Judge—Returns of election, correctness of—Issues touching.*—In *quo warranto* on the relation of the Attorney General to test the title of a Circuit Judge to his office, defendant averred generally that he was duly

**ELECTION, continued.**

elected. Plaintiff's replication set out specifically the returns from the counties comprising the circuit, and charged that the returns from a certain county had been excluded from the count. Defendant's rejoinder was a general denial of the averments of the replication—nothing more; *held*, that the correctness of the returns was not put in issue by the pleadings, and could not be enquired into.

*In quo warranto*, parties cannot go behind the official returns, unless the specific objections thereto be stated in the pleadings; there must be, *e. g.*, a specification of the number and names of the voters alleged to be illegal; general averments in reference thereto are insufficient.—*Id.*

**EMBEZZLEMENT**—See Administration, 2.

**EMINENT DOMAIN.**

1. *Eminent domain—Proceedings for condemnation of land—Exceptions filed out of time—Attempt at bargain with land owner—When need not appear.*—In proceedings for the condemnation of private property for public uses, in conformity with the act of March 10th, 1849, (Sess. Acts 1849, p. 593), as a general rule it must appear from the record that an attempt had been made to purchase the land of the owner, before it can be appropriated *in invitum*. But where the owner appears in court after the time for filing exceptions is past, and obtains leave to file them on condition of waiving all objections save as to the sufficiency of the damages, he cannot afterward avail himself of the failure of the record to show such attempt at bargain.—*U. S. of America v. Reed*, 565.

**ENGINEERS.**

1. *Engineer—Special tax bill—Substitution of name on bill.*—A special tax bill in which the name of the property owner originally inserted by the city engineer is stricken out and another added by the assignee instead, is inadmissible in evidence, and this is the case even although in suit on the bill against the party whose name is substituted, he admits that he owns the property mentioned in the bill.—*Kefferstein v. Knox*, 187.
2. *Engineer—Clerk, certificate, etc.*—It is competent for a city engineer to certify a tax bill upon a measurement made by his clerk. It is sufficient if the officer have official knowledge of the fact.—*Id.*
3. *Engineer.*—Is sole judge, of what.—*Estel, et al. v. St. L. & S. E. R. R. Co.*, 282.
4. *Engineer—Special tax bill—Judgment in case of, should be special against property.*—In suit on a special tax bill for street improvements no general or personal judgment against the defendant can be rendered. The judgment should be a special one against the property.—*Collins v. Cavender*, 286.

See St. Louis, City of, 3.

**EQUITY.**

1. *Equity—Temporary injunction granted where title to property is in dispute.*—Courts of equity will not usually grant a perpetual injunction, in a case where the title to the premises is put in issue, and where from the evidence the title is in doubt; but will only grant a temporary injunction to restrain the parties until the title can be settled at law. But the Chancellor may hear evidence on this point, notwithstanding.—*Lockwood v. Scott*, 68.
2. *Judgment—Assignment of—Equity.*—An assignee of a judgment which has been compromised cannot enforce it against the defendant in the judgment. The assignee takes the judgment subject to all its equities. And, *a fortiori*, a bill in equity will not lie on behalf of the creditors of the assignee, to enforce it against the judgment creditor.—*Bobb v. Taylor*, 311.
3. *Land and land titles—Equity—Bill of Peace.*—Where the correctness of a particular boundary line between two tracts of land has been thoroughly and satisfactorily tried in a number of actions, extending through a considerable time, and the verdict and judgment have always been in favor of the correctness of such boundary, equitable relief will be properly granted at the instance of the persons maintaining the correctness of said boundary by en-

## EQUITY, continued.

joining its assailants from further vexing and harassing those asserting it by a suit at law; and this, even if the said actions so tried did not involve the same pieces of ground; provided they involved the same boundary, and were between the same parties or their privies in estate.—*Primm, et al. v. Raboteau*, 407.

4. *Practice, civil—Trials—Testimony—Objections to—Grounds must be specifically stated, in legal or equitable actions.*—The rule requiring the grounds of objections to testimony to be specifically stated, applies alike to legal and equitable actions; and objections, the grounds of which are not specifically stated, are properly disregarded by the court.—*Id.*

5. *Land and land titles—Boundaries—Equity.*—*Semble*, that equity will interfere to ascertain and fix boundaries where the rights of a large number of persons are affected and a confusion of boundaries has been occasioned by lapse of time, accident or mistake, and a necessity therefore arises to adjust such conflicting claims and thus prevent interminable litigation.—*Id.*

6. *Bill in equity to set aside sale of land made during rebellion for non-payment of note.*—During the late rebellion, citizens residing in the rebel states were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Thus, where, after the President's proclamation of August, 1861, a note having been dishonored, certain land given under deed of trust to secure it was sold to satisfy the debt, a bill in equity will not lie on behalf of the maker to set aside the sale, on the ground that the plaintiff was, when the note matured and the land was sold, within the Confederate lines and cut off from all intercourse with the loyal States; it further appearing that the plaintiff had voluntarily gone and remained South. The doctrine of *Dean v. Nelson*, (10 Wall. 158) has no application to such a case.

*Held*, further, that the trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the maker of the note.

Failure of notice to him, or even his previous death, would not invalidate the sale. The notice required by statute was not intended to apprise the grantor in the deed of the sale of the land.—*DeJarnette v. DeGiverville, et al.*, 440.

7. *Note—Deed of trust—Sale under during war—Equity will interpose.* During the late war, the citizens of the rebel States being alien enemies were subject to the laws of nations, under which one residing in the South would be prohibited from paying a note which fell due in the loyal States during that period. Hence, default in its payment under such circumstances would not authorize the sale of land given under deed of trust to secure it, and equity would interpose to set aside the sale.

The note and deed of trust must be construed as made subject to the implied power of the governments to which the parties belong, to interfere with or suspend it "*flagrante bello*."—*PER NAPTON, J. DISSSENTING.*—*Id.*

8. *Equity—Practice, civil—Motions—Relief.*—Where a motion is made under a statute for a particular remedy therein provided, it is not competent for the court, on that motion, to grant other equitable relief which is not embraced in or relied on in the motion.—*Schneider v. Meyer, et al.*, 475.

See Administration, 3; Bills and Notes, 4; Garnishment, 1; Injunction.

## ESTOPPEL.

1. *Mechanic's lien—Lease-hold estate—Delivery of lease—What facts estop denial of.*—Where the owner of land stated to a house-builder that he had leased certain premises to a third party, and the builder thereafter erected a hotel on said ground, with the knowledge of the owner and without objection on his part; but on the contrary it appeared that the owner furnished said lessee with money to aid in erecting the hotel, and the lease was manifestly given with a view to such improvement; these facts, whether the lease was delivered or not, would estop the lessor from denying the delivery. And *semble*, that the fact that the owner, some months after the commencement of the building, and when the lessee's responsibility became questionable, took from him a written surrender of the lease, would also estop him from asserting its non-delivery.—*Allen v. Sales, et al.*, 28.

## ESTOPPEL, continued.

2. *Estoppel—Not the basis of title—May be used in rebuttal by plaintiff, when.—Semble*, that an estoppel *in pais* can never form the basis of a title on which ejectment will lie. But *held*, that in ejectment founded on a sheriff's deed which conveyed a certain lease-hold estate as that of defendant in the execution, where the owner of the land sets up as a defense the non-delivery of the lease, such defense may be rebutted by proof of acts on the part of the owner constituting estoppel *in pais*. In such case the claim of estoppel is used defensively and not as the creation of a title.—*Id.*
3. *Promissory notes—Deed of composition—Estoppel—Trust note.*—In an action by the holder against the indorser of a promissory note, where it appeared that the maker had entered into a deed of composition and release with his creditors, and that plaintiff had accepted its provisions, and nothing on the face of the note showed that it was held by plaintiff in trust, and it was treated by him as his individual property, he is estopped so far as the maker is concerned, from after claiming that he held the note as guardian.—*Eggemann v. Henschen*, 123.
4. *Estoppel—Improvements upon land, etc.*—A deed of land, although containing a false description of the property, when taken in connection with the fact that for fifteen years after its execution, the grantor lived in sight of the premises and saw valuable improvements erected thereon, was held sufficient to work an estoppel as against the grantor.—*Thomas v. Pullis*, 211.
5. *Mechanics' lien—Bond against liens—Liens filed by surety on bond—Estoppel—Counter-claim—Injunction.*—A. advanced money to B. to enable B. to improve certain land, taking a deed of trust on the land, and a bond from C., the contractor, with D. as surety, that the buildings to be erected would be delivered to B. free from mechanic's liens. E. afterwards purchased the property and took an assignment of the bond. D. subsequently filed a lien for materials delivered to C. for the builders. *Held*, that D. was not estopped by the bond from filing his lien; that if A. lost any part of his money by reason of such lien being filed, the damage so sustained might be set up as a counter-claim. *Semble*, that if D. was about to enforce a lien, which endangered A's. debt, A. might enjoin its collection till his debt was paid.—*Hartman v. Berry, et al.*, 487.

## EVIDENCE.

1. *Evidence—Writing—Verbal stipulation cannot contradict.*—The doctrine is well established that no antecedent or contemporaneous verbal stipulations are admissible to contradict or vary the terms of a written instrument.—*Helmrichs v. Gehrke*, 79.
2. *Practice, civil—Witnesses—Cross-examination of—How far may be carried.*—If a witness is sworn and gives some evidence, however informal and unimportant, he may be cross-examined in relation to all matters involved in the case. *St. L. & I. M. R. R. v. Silver*, 265.
3. *Practice, civil—Trials—Testimony—Objections to—Grounds must be specifically stated in legal or equitable actions.*—The rule requiring the grounds of objection to testimony to be specifically stated, applies alike to legal and equitable actions; and objections, the grounds of which are not specifically stated, are properly disregarded by the court.—*Primm, et al. v. Raboteau*, 407.
4. *Contracts—Action for breach of—Evidence not admissible to show a different breach from that set up.*—Where suit is brought for damages for a specified breach of contract, evidence of a different and additional breach is not admissible.—*Huston v. Forsyth Scale Works*, 416.
5. *Evidence—Age and pedigree—Family records—General Repute.*—On questions of age and pedigree, family records are admissible in evidence. General repute with the family is also sometimes admissible in such cases.—*Beckham v. Nackle*, 546.

See Administration, 1; Contracts, 3; Conveyances, 1; Engineer, 1; Land and Land Titles, 2, 8; Partnership, 3; Practice, civil, new trials, 4; Practice, civil; Trials, 8, 11, 15; Practice, Sup. Ct., 2, 3, 6, 7, 8.

EXCEPTIONS, BILL OF, see Practice, Supreme Court 1.

**EXECUTION.**

1. *Practice, civil—Motion for a new trial—Execution.*—It is error to issue execution before motion for a new trial is determined.—*Stephens v. Brown*, 23.
  2. *Replevin vs. Constable's Adm'r—Competency of plaintiff as witness—Constr. Stat.—Surplus fund—Creditors.*—In replevin by a third party against a constable for goods seized under execution, where the constable died after suit was commenced and his administrator was substituted as a party, the plaintiff then ceased to be a competent witness under the statute. (*Wagn. Stat.* 1371-2, § 1.)
- In such proceeding, judgment being given in behalf of defendant for the value of the property, any surplus after satisfying the execution debt, may be seized by the other creditors. Plaintiff in the replevin cannot hold it.—*Blobaum v. Gambs, Adm'r*, 183.
3. *Execution creditor—Appropriation of money in hands of sheriff to—Levy upon, under writ against execution creditor.*—A sheriff who has received money on an execution, cannot, before the same is paid over or appropriated, attach or levy upon the money so held, on a writ issued against the execution creditor. If in such case the sheriff should make the proper appropriation, his act in so doing might be upheld. But he is not bound to appropriate the money but may return his executions and money into court for its disposition of the same.—*State ex rel. v. Taylor, et al.*, 492.

See Administration, 10; Sheriff's Sales, 1.

**EXECUTORS**, see Administration.

**F.**

**FACTORS**, See Contracts, 2.

**FAMILY RECORDS**, See Evidence, 5.

**FERRY**, See Injunction, 1.

**FORCIBLE ENTRY & DETAINER**, See Landlord & Tenant, 2.

1. *Forcible entry and detainer—Judgment for rents and profits—Joint judgment, when proper.*—Ordinarily, in proceedings under the forcible entry and detainer act, where one of the defendants comes into possession subsequently to the other, and holds it for a shorter time, a joint judgment for rents and profits would be improper. But where they are put in possession in pursuance of one general design and are acting in concert to hold the possession as agents of a third party, so as to shift the burden of proving title to the property, such judgment will not be held to be error.—*Kingman, et al. v. Abington, et al.*, 46.

**FORWARDER**, See Common Carrier.

**FRAUD**, See Account Stated, 1; Agency, 5; Bills & Notes, 7; Practice, Civil, Trials, 14.

**FRAUDS, STATUTE OF.**

1. *Statute of frauds—Verbal agreement, when not within.*—The question whether or not a verbal contract comes within the statute of frauds, depends wholly upon the agreement. If the party agrees to be originally bound, the contract need not be in writing, but if his agreement is collateral to that of the principal contractor, or is that of a guarantor or a surety for another, then the agreement must be in writing.—*Barker v. Scudder*, 272.
2. *Sales—Statute of frauds—Auctioneer—Memoranda—Names of parties—Principal and agent—Description of property.*—The memorandum of a sale of land by an auctioneer, as made by his clerk, was prefaced by an advertisement, pasted in the book, which contained the name of the tract sold, which was well known, and a partition of which was recorded, and stated that it was sold by order of the heirs of the estate to which it belonged, naming it; de-



**FRAUDS, STATUTE OF, continued.**

scribed its location in general terms, and referred to lithographic plats to be ready at the day of sale. On the margin was a note, "sold on account of A." On the sale, the clerk made a minute immediately following the advertisement as follows: "Lots 1 and 2, C. D." (the name of the purchaser,) "111, \$15, \$1,665.00." It was admitted by the pleadings, that the auctioneers were the agents of the heirs of said estate. *Held*, that the note on the margin did not indicate that the memorandum of sale showed an agreement of the purchaser with A.; it might show that A. had an interest without necessarily implying that he was the contracting party; that the memorandum and the advertisement taken together sufficiently disclosed the principal for whom the auctioneers acted, and if they did not, parol evidence was admissible for that purpose; that the name of the tract being well known, and by its very title referring to a partition and plat which were of record, was a sufficient description of the property for the purposes of the memorandum; and that the writing of the name of the purchaser by the auctioneer's clerk was a sufficient signature under the Statute of Frauds.—*Briggs v. Munchon*, 467.

**FRAUDULENT CONVEYANCES.**

1. *Fraudulent conveyances—Change of possession, what necessary under the statute.*—To render a sale of personal property valid as against creditors, etc., it must be followed by an actual and continued change of possession, and a change so open, notorious and unequivocal as to apprise the community that the vendor had ceased to be the owner of the property. (See *Wagn. Stat.*, 281, § 10; *Claffin vs. Rosenberg*, 42 Mo., 439; *Lessem vs. Herriford*, 44 Mo., 323.) —*Bishop v. O'Connell*, et al., 158.
2. *Sale of personal property—Change of possession—Reasonable time—What is.*—What will be a "reasonable time" for change of possession of personal property after sale, as meant by the statute (*Wagn. Stat.*, 281, § 10,) must be determined by the circumstances of each case. No definite rule can be laid down.—*Id.*

**G.****GARNISHMENT.**

1. *Garnishment—Trust property not subject to.*—The statute touching garnishment is essentially legal and not equitable in its nature and procedure; and the rights, credits and effects in the hands of the garnishee which are subject to attachment are such as are not encumbered with trusts, and such as may be delivered over, or paid to the officer under the direction of the court, free from the encumbrances of a trust.

Where a conveyance in trust is made in fraud of creditors, a different rule prevails, for the instrument being void, the property is subject to attachment under simple law process.—*Lackland v. Garesche*, 267.

**GRANTS FROM UNITED STATES.**

1. *Deeds—Grants from United States—What certainty required in.*—The same certainty of description is not required in deeds from the government to individuals, or between grantor and grantee, as in case of sheriffs' deeds and other proceedings *in invitum*. In the former, parol evidence is allowed to explain and identify and locate.—*Long v. Higginbotham*, 245.

See *Land & Land Titles*, 5.

**GUARANTY.**

1. *Guaranty, verbal—What necessary to constitute.*—To constitute a verbal guaranty or personal undertaking, it is unnecessary that the word "guaranty" should be used. But is sufficient if, in view of all the circumstances attending the transaction, the ingredients necessary to constitute such a guaranty, viz.: the intention of the one party that his affirmation should operate as an inducement to the other party to buy or receive the thing, and the acceptance of a reliance upon such inducement by the latter, be shown to exist.—*Barker v. Scudder* 272.

## GUARANTY, continued.

2. *Guaranty—Notice of non-payment—Unnecessary, when.*—Where one knowing of the existence of certain notes personally guarantees their payment, notice of non-collection is not necessary in order to bind him. The extent of his obligations in such case is not within the peculiar knowledge of the opposite party, so that information touching the same ought to be communicated to him; but he has the means of knowledge at his own command.—Id.  
See *Frauds*, Statute of, 1.

GUARDIAN & WARD, See *Infants* 1.

## H.

HOME MUT. FIRE & MARINE INS. CO.—See *Insurance*, Fire, 3, 4.

## HUSBAND AND WIFE.

1. *Married woman—Separate estate, etc.*—As to her separate estate, a married woman is *feme sole*.—*Meyers v. Van Wagoner*, 115.
2. *Married woman, note of—Binds separate estate, when.*—The delivery of her note by a married woman, raises the presumption that she intends to bind her separate estate.—Id.
3. *Administrator must determine for himself whether fund belongs to estate of deceased—Parol evidence, when proper, etc.*—An agent credited to the account of the husband the proceeds derived from the sale of certain lands belonging to the wife, and turned the sum over to the administrator of the husband, Held, that the administrator properly refused to be governed by the books of the agent, and was right in not charging himself with that amount. He was authorized to determine for himself to what fund it belonged. And the fact might be shown by parol evidence.—*Pattison, Adm'r v. Coons*, 169.
4. *Husband and wife—Wife may answer separately, when.*—Under the statute (*Wagn. Stat.*, 1001, § 8) a married woman may answer separately although her husband be co-defendant.—*Siemers v. Kleeburg*, 196.
5. *Married woman—Mortgage on separate property—Acknowledgment—Relinquishment of dower, etc.*—The certificate of acknowledgment of a married woman to a mortgage given by her on her separate property, is not void by reason of the fact that she is therein made to relinquish her dower. Such clause may be rejected as surplusage.—Id.
6. *Married woman—Acknowledgment by in 1859 before notary.*—Under the act of February 15th, 1864, amendatory of § 37, ch. 32, R. C. 1855, (*Adj. Sess. Acts* 1863-4, p. 27,) the acknowledgment of a married woman, dated in 1859, was good although taken before a notary public. (See *Mitchell vs. People*, 46 Mo., 204.)—Id.
7. *Feme covert—Mortgage of separate estate—Acknowledgment—Unnecessary when.*—*Semble*, that if a *feme covert* signs a promissory note, her separate estate will be bound, although her deed of trust given upon such estate to secure the note was unacknowledged.—Id.
8. *Married woman—Contract—Consideration.*—The contract of a *feme covert* in order to bind her separate estate need not be based upon a consideration moving directly to her.—Id.
9. *Married woman—Mortgage by charge upon rents, etc., when—Trustee should be party, when.*—A mortgage by a married woman upon property held by her trustee will be construed in equity as a charge upon the rents and profits arising therefrom in the hands of the trustee. And in suit to foreclose such mortgage, and for general relief, the trustee should be joined as a party.—Id.
10. *Married women—Contracts—Separate estate.*—It is the well settled law of this State, that if a married woman, who is possessed of real estate for her sole use, execute a promissory note, it will be presumed that she intended to charge her separate property with the payment thereof. And it is not necessary that the instrument which she executes, whereby she promises to pay a sum of money

## HUSBAND AND WIFE, continued.

should assume the shape of a promissory note. Her intention to bind her separate estate will, in the absence of anything to the contrary, accompany the act as well in one case as the other. In the contemplation of equity a married woman is as completely clothed, so far as her separate property is concerned, with the *jus disponendi*, as any other property owner.—*DeBaun v. Van Wagoner, et al.*, 347.

11. *Husband and wife—Insurance policy for wife's benefit—Wife may sue in her own name.*—Where an insurance policy showed that it was effected by the husband for the benefit of his wife, the statute (Wagn. Stat., p. 1000, § 3) would not preclude the wife, after his death, from suing upon it in her own name. (*Rogers v. Gosnell*, 51 Mo., 466, affirmed.)—*McComas v. Cov. M. Ins. Co.* 573.

12. *Husband and wife—Necessaries—Notice to cease furnishing, etc.—Husband bound for afterward, when.*—In order to bind the husband for goods sold the wife, after the seller has had notice to discontinue the sales, the latter must show, not only that the goods are necessaries, but that the husband has failed to make an adequate supply of them.—*Barr v. Armstrong*, 577.

See Mortgages, 3; Wills, 6; Trusts and Trustees, 2.

## I.

## INFANTS.

1. *Constitution—Title of infant—Power of legislature to pass.*—The legislature has power to authorize a guardian or administrator, or any one else named in the act, to pass the title of an infant, or to compromise an unsettled claim upon such terms as the parties may agree upon.—*Thomas v. Pullis*, 211.
2. *Infancy—Ratification of deed after majority—Acquiescence.*—The mere inaction of an infant after coming of age will not constitute a confirmation of a deed made by him during infancy. (*Huth vs. Carondelet & Marine R'way Co.*, ante, p. 202.)—*Thomas v. Pullis*, 211.
3. *Divorce—Infants—Care and custody.*—A divorce was granted to the father and against the mother of young female children; the mother was entirely able and competent to take care of them, and bring them up and educate them; *Held*, that although the law generally gives the father the care of such children, they should properly be left with the mother with a view to the best interests of the children. *Ordered*, that the mother should have the care and custody of the children until the further orders of the court.—*Messenger v. Messenger*, 329.
4. *Marriage—Infants—Liability of Magistrate—Defense.*—An honest mistake by a magistrate performing a marriage ceremony as to the age of a person whom he married, is no protection against the penalty affixed by law to the performance of such ceremony when the persons married are minors, without the consent of their parents or guardians.—*Beckham v. Nacke*, 546.

See Conveyances, 2.

## INJUNCTION.

1. *Injunction—Ferry privilege—Conflicting charters of Missouri & Kansas Legislature.*—In bill to enjoin defendant from ferrying the Missouri River between this State and Kansas, within a certain territory to which plaintiff claimed the exclusive franchise, solely by virtue of the Act passed by this State, Nov. 17th, 1855, demurrer held well taken. *Non Constat*, but that under an Act passed by the Legislature of Kansas, defendant had a similar privilege of ferrying from the opposite shore.—*Challiss v. Davis*, 25.
2. *Equity—Temporary injunction granted where title to property is in dispute.*—Courts of equity will not usually grant a perpetual injunction, in a case where the title to the premises is put in issue, and where from the evidence the title is in doubt; but will only grant a temporary injunction to restrain the parties until the title can be settled at law. But the Chancellor may hear evidence on this point, notwithstanding.—*Lockwood v. Scott*, 68.

## INJUNCTION, continued.

2. *Injunction against mining by a trespasser who is insolvent.*—It has long been settled that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted; and more particularly is this true when the trespasser is insolvent.—*Id.*

See Administration, 3; Landlord and Tenant, 7; Mechanic's Lien, 7.

INSTRUCTIONS, see Practice, civil, Trials.

INTEREST, see Bonds, Andrew County.

## INSURANCE, FIRE.

1. *Insurance—Acceptance of premium—Delivery of policy—Notice of fire—Payment of premium—Waiver—Instructions.*—When an Insurance Company accepts the premium and delivers the policy, the contract to insure is complete and executed; and it relates back to the day when the application was filed and the policy made out and signed; and the insured is under no obligation to notify the company that the building insured has been destroyed by fire in the meantime. And the premium need not be paid in order to bind the contract, where the company waives its right to immediate payment and extends credit to the assured. The obligation of the company remains notwithstanding, and the question of such waiver is one of fact to be submitted to the jury by appropriate instructions.—*Baldwin v. Chouteau Ins. Co.*, 151.
2. *Fire insurance—Delivery—Agency.*—Delivery of plats of a building proposed to be insured to the agent of an insurance company, held delivery to the company.—*Moore, Assignee, v. Atlantic M. Ins. Co.*, 343.
3. *Home Mutual Fire Ins. Co.—Cancellation of policy—Resolution of board—Notice—Company bound notwithstanding, when.*—By the terms of the charter of the Home Mutual Fire and Marine Insurance Company, of St. Louis, before the cancellation of any policy could take effect, it was to be entered on the books of the company; and it retained the right to make assessments up to that time. *Held*, that without such step the company would be liable to a policy-holder in case of loss by fire, notwithstanding the fact that a resolution had been adopted by the board ordering the secretary to notify the policy-holder that the company would discontinue its risk, and the fact that the resolution was transmitted by that officer, together with notification that the policy was thereby canceled, etc.—*Landis v. Home M. F. & M. Ins. Co.*, 591.
4. *Corporations—Fire Insurance—Home Mutual—Limitation as to time of beginning suit.*—The charter of the Home Mutual Fire and Marine Insurance Company, of St. Louis, by virtue of a section adopted in 1845 and printed on its policies as a part thereof, provided that in case of loss by fire, the injured party should "present his claim to be adjusted and determined by the company, as to the amount to be paid him," etc. If not satisfied he was authorized to sue within a specified time and not afterward. *Held*, that the limitation as to time of suit had no application to a case where the company claimed a total exemption from all liability. In such case, the only limitation would be the bar of the general statute.

The decision in *Keim v. Home Mut. F. & M. Ins. Co.*, (42 Mo. 38) turned upon an amendment adopted in 1857, and forming no part of the policy under consideration.—*Id.*

## INSURANCE, LIFE.

1. *Insurance, life—Capital stock—Taxation, what property subject to.*—Section 40 of the act touching life insurance, (Wagn. Stat. 752) provides that the payment of certain fees by the respective companies, shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid up capital stock the same as other property in the county, for county and municipal purposes." *Held*, that this provision, properly construed, did not prevent the taxation of other property owned by the companies, over and above the par value of their capital stock. Such is not double taxation. But the non-taxation of such property would amount to an exemption, in violation of the State Constitution. (See *Life Association of America v. Board of Assessors, etc.*, 49 Mo., 512.)—*St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County, et al.*, 503.

## INSURANCE, LIFE, continued.

2. *Husband and wife—Insurance policy for wife's benefit—Wife may sue in her own name.*—Where an insurance policy showed that it was effected by the husband for the benefit of his wife, the statute (Wagn. Stat., p. 1000, § 3) would not preclude the wife, after his death, from suing upon it in her own name. (Rogers v. Gosnell, 51 Mo. 466, affirmed.)—McComas v. Cov. Mut. Ins. Co., 573.

## J.

JEOFAILS, see Administration, 3; Judgment, 1; Practice, civil, 1.

## JUDGMENT.

1. *Judgment—Clerical omission in—Corrected at subsequent term, how—Interlineations.*—Where a clerk is ordered by the court at a subsequent term to supply a clerical omission in the record of a judgment by an entry *nunc pro tunc*, the proper course would be to enter anew in the proceedings of that term the entire judgment as corrected; and the action of the clerk in supplying the omitted part of the judgment, by an interlineation in the record of the preceding term, would be loose, irregular and reprehensible. But *semble*, that such improprieties of the clerk would not render the judgment a nullity.—Allen v. Sales, et al., 28.
2. *Judgment—One rendered on two counts not ground for reversal, when.*—*Semble*, that where an action was founded upon one continuous account for services for two years, the contract for the second year being only a slight modification of the original agreement, one judgment rendered on both counts would not be ground for reversal.—Edwardson v. Garnhart, 81.
3. *Special tax-bills—Personal and general judgment on.*—In suit on a special tax-bill, the rendition of a personal or general judgment against defendant is error.—Strassheim v. Jerman, 105.
4. *Judgment for costs a final judgment.*—Where a suit is dismissed, judgment against plaintiff for costs is a final judgment from which appeal will lie.—O'Connor v. Koch, 253.
5. *Engineer—Special tax bill—Judgment in case of should be special against property.*—In suit on a special tax bill for street improvements no general or personal judgment against the defendant can be rendered. The judgment should be a special one against the property.—Carlin v. Cavender, 286.
6. *Judgment—Default—Setting aside, matter of discretion with trial court.*—Whether application to set aside judgment by default on the ground that counsel, when the case was called, was disposing of a case in another court, should be granted, held a question to be determined by the trial court in the exercise of a sound discretion. (See Jacob vs. McLean, 24 Mo., 40.)—Griffin v. Veil, 310.
7. *Judgment—Assignment of—Equity.*—An assignee of a judgment which has been compromised cannot enforce it against the defendant in the judgment. The assignee takes the judgment subject to all its equities. And, *a fortiori*, a bill in equity will not lie on behalf of the creditors of the assignee, to enforce it against the judgment creditor.—Bobb v. Taylor, et al., 311.
8. *Judgment—Satisfaction of—Notes given for.*—A note given by a judgment debtor to the judgment creditor for the amount of the debt, but designed only to fix the time for payment, and which being unpaid at maturity is returned to the maker, is not a satisfaction of the judgment; and the co-defendants of the debtor, against whom judgment has also been rendered, are not entitled, on account of said note, to have the judgment entered as satisfied. The delivery of such note to plaintiff is not a satisfaction of the judgment either at law or in equity.—Schneider v. Meyer, et al., 475.

See Administration, 2; Forcible Entry and Detainer, 1; Mechanics Lien, 2, 3; Sheriff's Sale, 1; Special Taxes, 2, 3.

**JURISDICTION.**

1. *Mechanics' lien—Bankruptcy—Jurisdiction.*—When the property of a bankrupt under the United States Bankrupt Law is subject to a mechanic's lien, the bankrupt court may order the assignee to sell the property and pay off the lien out of the proceeds, or may order the property to be sold subject to the lien, and in that case, the courts of the State whose statute gives the lien, would have jurisdiction to ascertain and enforce the lien against the property, notwithstanding the proceedings in bankruptcy.—*Douglas v. St. Louis Zinc Co. et al.*, 388.

See Mechanic's Lien, 5.

**JURY.**

1. *Juryman—What opinion renders incompetent.*—The mere fact that a jurymen has formed an opinion does not, of itself, render him incompetent. To have that effect, the opinion must be such as might influence his judgment. In suit on a policy of life insurance, where the company in its defense denied all responsibility and refused to pay anything, such defense amounts to a waiver of notice and proof of death; and where such defense is interposed to a suit on a policy which requires the insurance to be paid within sixty days after notice and proof of loss, the sum will be held due at that period after the death.—*McComas v. Cov. Mut. Ins. Co.*, 578.

See Referee, 1; Practice, civil, Trials, 3, 6.

**JUSTICE'S COURT.**

1. *Justices' courts—Appeal—Sureties—Non-suit.*—Where defendant appealed from the judgment of a justice, and in the Circuit Court plaintiff took a voluntary non-suit which was afterwards set aside without the knowledge or consent of the sureties on the appeal bond, and plaintiff had judgment against defendant and his sureties, *Held*, that the sureties were bound by the judgment.—*Bailey v. Rosenthal*, 385.

**L.**

LAND COMMISSIONER, see St. Louis, City of, 1.

**LAND AND LAND TITLES.**

1. *Ejectment—Falsa demonstratio.*—In a suit in ejectment, it appeared that "A." had obtained a concession of certain lands in New Madrid from Baron De Carondelet, that he conveyed to plaintiff's grantor all his lot or lots in the town of New Madrid, which were at any time granted to him by the commandant of that place. *Held*, that in the absence of any extrinsic evidence showing that he was not the owner of another lot in New Madrid in addition to the above concession and granted by the commandant, the words "which were at any time granted to him by the commandant of the place," could not be rejected as a false demonstration in order to show that the same land passed by both grants.—*Gitt v. Eppler*, 139.

2. *Land—Dedication of to public use—Alley in rear of premises—Taxes and repairs on, paid by owner—Use of by public in connection with proprietor—Intention to dedicate—User.*—To constitute a valid dedication of land to the public there must be a clear intention on the part of the owner to dedicate; which may be established in various modes, some of which are provided by statute and others by such acts or declarations *in pais* as are satisfactory evidence of such design; and there must be an acceptance of such dedication by the public, either by *user* for a length of time more or less according to circumstances, or by its adoption by the public authorities.

The owner of land in St. Louis on which certain dwelling houses were built, left a way through the rear of the premises and connecting with a public alley, wide enough for the passage of vehicles, which space was at all times used by the tenants for taking in coal, supplies and the like, and removing dirt, etc. The city never exercised control over the passage, or declared it to be a public alley; but the owner when occasion required had it closed up against the pub-



## LAND AND LAND TITLES, continued.

- lic. *Held*, that although the public had for many years frequently used the alley, as a matter of convenience in passing to and fro, such facts did not constitute a dedication of the alley to the public, or an acceptance of a dedication by the public. The use by the community in such case was not an adverse but merely a permissive use in connection with, and in subordination to, that by the tenants. Hence the length of time through which the way was so used by the public would be of no importance.—*Brinck v. Collier*, 161.
3. *Limitations, statute of—Adverse possession—Action of ejectment by possessor—Title of Government, presumption as to.*—Ten years adverse possession, except as against the Government and parties laboring under disabilities, is not only a bar under the statute of limitations, but creates in the possessor an affirmative title under which he may maintain ejectment. And such possession will raise a presumption that the title has emanated from the Government and vested in the holder.—*Barry v. Otto*, 177.
  4. *Ejectment—Disputed boundary lines—Whether covered by certain deeds, question for jury.*—In ejectment for land between disputed boundary lines, the question whether a deed under which plaintiff claimed covered the strip in controversy was held to be one of fact for the jury.—*Id.*
  5. *Land titles—Confirmation under act of Congress, good as against subsequent grant, etc.*—A confirmation of land made in 1811, under the act of Congress of March 3rd, 1807, accompanied with a survey of said confirmation in 1845 and a certificate for patent, is good as against a grant from Congress of the same land made in 1866. At the date of said grant the United States had no title to the land except a bare legal title. The equitable title was in the confirmee; and the legal title under our statute would in such case enure to the owner of the equitable one.—*Le Beau v. Armitage, et al.*, 191.
  6. *Land titles—Title bought by vendee to defeat vendor.*—It is the settled law of this State that a vendee may buy up a title antagonistic to that of his vendor, and set up the title so bought to defeat that of his vendor.—*Huth v. Carondelet M. R. & Dock Co.*, 202.
  7. *Land titles—Possession of part with claim of the whole—Adverse possession connected with deed.*—The doctrine of constructive possession which follows the title where there is no adverse possession, is applied to one who takes actual or corporeal adverse possession under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters and which he claims by virtue of such an instrument. But such possession is never based upon a claim merely. There must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries as well as actual possession of a part.—*Long v. Higginbotham*, 245.
  8. *Deeds—Grants from United States—What certainty required in.*—The same certainty of description is not required in deeds from the government to individuals, or between grantor and grantee, as in case of sheriffs' deeds and other proceedings *in invitum*. In the former, parol evidence is allowed to explain and identify and locate.—*Id.*
  9. *Land and land titles—Equity—Bill of Peace.*—Where the correctness of a particular boundary line between two tracts of land has been thoroughly and satisfactorily tried in a number of actions, extending through a considerable time, and the verdict and judgment have always been in favor of the correctness of such boundary; equitable relief will be properly granted at the instance of the persons maintaining the correctness of said boundary, by enjoining its assailants from further vexing and harassing those asserting it by a suit at law; and this, even if the said actions so tried did not involve the same pieces of ground; provided they involved the same boundary and were between the same parties or their privies in estate.—*Primm, et al. v. Raboteau*, 407.
  10. *Res adjudicata—Practice, civil—Parties—Tenants in common—Privy.*—A judgment in favor of defendants in a cause, determining their right to property in dispute, is binding upon all who are tenants in common or claim under the same title with the plaintiff, when the title of all such tenants in common hangs upon the same thread, and depends upon the same facts, although all have not been parties to the suit.—*Id.*

## LAND AND LAND TITLES, continued.

11. *Land and land titles—Boundaries—Words of description.*—The words "the middle of the natural channel of the creek, when the pond is exhausted," mean the position of the thread of the creek when the pond was actually exhausted. (*Primm vs. Walker*, 38 Mo., 94; *Mincke vs. Skinner*, 44 Mo., \*92, affirmed.)—*Primm, et al. v. Raboteau*, 407.
12. *Land and land titles—Boundaries—Equity.*—*Semble*, that equity will interfere to ascertain and fix boundaries where the rights of a large number of persons are affected and a confusion of boundaries has been occasioned by a lapse of time, accident or mistake, and a necessity therefore arises to adjust such conflicting claims and thus prevent interminable litigation.—*Id.*
13. *Party walls—Adjoining proprietors—Rights of—Tearing down—Re-building.*—The owner of each building supported by a common wall is entitled to have it supported by such wall so long as it is in a condition to uphold it, but when it becomes ruinous or dangerous, so that it endangers the safety of the property or life of the occupants, neither party is obliged to wait till the building falls down, but may proceed to rebuild; and the adjacent proprietor who refuses or neglects to join in the expense has no right of action for the damage or inconvenience which is occasioned by such repairs or rebuilding of the wall. This does not justify carelessness or negligence in doing the work.—*Crawshaw v. Sumner*, 517.

See Administration, 7, 8; Conveyance, 1; Equity, 1; Estoppel, 2, 4; Infants, 1, 2.

## LANDLORD AND TENANT.

1. *Landlord and tenant—Lessee holding over—Notice to quit, when not necessary.*—A lessee for a year, holding over, but disclaiming his landlord's title, is not entitled to notice to quit.—*Stephens v. Brown*, 23.
2. *Landlord and tenant—Forcible entry and detainer—Sale of premises—Attornment.*—Under the statutes of this State, in suit by the landlord against his tenant for forcible entry and detainer, defendant may show that plaintiff has parted with his title, as by sale under a deed of trust, provided that the tenant has attorned to the purchaser. (See *Pentz vs. Kuester*, 41 Mo., 447.)—*Kingman, et al., v. Abington, et al.*, 46.
3. *Possession of landlord after tenant's departure need not be personal.*—When a tenant leaves either at the end of the term or by surrender of the lease, the landlord comes into the sole possession of the premises, although not personally present.—*Id.*
4. *Lease—Release from "further" liability—The meaning of word "further."*—A release by a lessor of his lessee from "further" liability under his lease is not a release from liability for taxes already accrued and which by the terms of the lease, the lessee had assumed to pay. The word "further" as there used means "future."—*O'Fallon v. Nicholson*, 238.
5. *Landlord—Title not disputed by tenant.*—One holding under a lease cannot dispute the title of his lessor by showing him to be trustee of one having adverse or paramount title; and the same rule applies to the assignee of the lessee.—*Stagg v. Eureka T. & C. Co.*, 317.
6. *Landlord and tenant—Crops—Pledge of as security for rent—Rights of landlord—Replevin.*—An agreement of lease of a farm contained a provision that in order to secure the rent reserved, the lessee conveyed and sold to the landlord all of a certain crop then growing on the land, with the power, in case of non-payment of the rent when due, to take possession of the crop and apply the proceeds *pro tanto* to the payment of his rent. *Held*, that the landlord had no right to the immediate possession of the crop; his right to possession depended upon the lessee's failure to pay rent, therefore before that contingency occurred the landlord had no right to replevy the crops.—*Sheble v. Curtt*, 437.
7. *Landlord and tenant—Rent—Crops—Lien—Attachment—Injunction.*—Under the statute which provides that every landlord shall have a lien upon the crop grown on the demised premises in any year, for the rent that shall accrue for

**LANDLORD AND TENANT, continued.**

such year, (1 Wagn. Stat., 880, § 18,) an attachment as provided for in the 26th section of the same act, (Wagn. Stat., 881-2;) is not necessary to enforce the lien. The court would enforce the lien without such process and would enjoin the removal or disposition of the crops while the lien continued. An attachment is proper only where there is no lien.—*Price v. Roetzell, Adm'r*, 500.

See *Mechanics' Lien*, 1; *Trusts and Trustees*, 2.

**LARCENY**, see *Practice, criminal*, 1.

**LEASE**, see *Landlord and Tenant*, 4.

**LEVY**, see *Execution*, 3.

**LIMITATION.**

1. *Ejectment—Statute of Limitations—Possession for period of—Patent need not be proved when.*—Possession of land in the owner or his grantors for more than thirty years, accompanied with a claim of right, establishes a title which will warrant a recovery in ejectment, unless defeated by a better title set up by defendant. It is unnecessary in such case to go further and show title from the United States, where the Government is no party to the suit.—*Davis v. Thompson*, 39.
2. *Limitations, statute of—Adverse possession—Action of ejectment by possessor—Title of Government, presumption as to.*—Ten years adverse possession, except as against the Government and parties laboring under disabilities, is not only a bar under the statute of limitations, but creates in the possessor an affirmative title under which he may maintain ejectment. And such possession will raise a presumption that the title has emanated from the Government and vested in the holder.—*Barry v. Otto*, 177.
3. *Limitations, statute of—Trusts, express—Denial of trust.*—In express technical trusts, the statute of limitations does not begin to run until the trust is denied by the trustee; (*Smith vs. Ricords*, 52 Mo., 581, affirmed) but the *cestui que trust*, in case of such denial, is limited to the period allowed for the recovery of legal estates at law.—*Ricords, admx. v. Watkins*, 553.
4. *Limitations, statute of—Implied Trusts—Right of action.*—In implied trusts the statute of limitations begins to run as soon as the facts are brought to the knowledge of the *cestui que trust*, so that he can take steps to enforce the trust. (*Smith v. Ricords*, 52 Mo. 581, affirmed.)—*Id.*
5. *Limitations, statute of—Trusts, implied—Express.*—It is not impossible that an express continuing trust, against which the statute of limitations would not run, could be shown by evidence independent of the writing conveying the property to which the trust is attached; and that it thus might be shown by independent testimony, that the possession or conduct of the trustee was consistent with, and not adverse to, the claim or right set up by the *cestui que trust*.—*PER VORIES AND NAPTON, J. J., DISSENTING.*—*Id.*

**M.****MACON COUNTY.**

1. *Macon County—Charter—Tax levied by—How much per annum.*—In mandamus to compel the County Court of Macon county to levy a tax to meet the indebtedness of the county on railroad bonds issued for the Missouri & Mississippi Railroad Company, *held*, that under § 15 of the charter of the company (*Sess. Acts 1863*, p. 86,) said County Court had no power to levy in one year a tax of more than one-twentieth of one per cent. upon the assessed value of the taxable property in the county. County Courts have only such powers as are granted by statute; they can have no implied right to levy taxes.—*State v. Shortridge, et al.*, 126.

**MALICE**, see *Attachment*, 2.

**MARRIAGE.**

1. *Marriage—Infants—Liability of magistrate—Defense.*—An honest mistake by a magistrate performing a marriage ceremony as to the age of a person whom he married, is no protection against the penalty affixed by law to the performance of such ceremony when the persons married are minors, without the consent of their parents or guardians.—*Beckham v. Nacke*, 546.

See Husband and Wife.

**MARRIED WOMEN**, see Husband and Wife.

**MECHANIC'S LIEN.**

1. *Mechanic's lien—Leasehold estate—Delivery of lease—What facts estop denial of.*—Where the owner of land stated to a house-builder that he had leased certain premises to a third party, and the builder thereafter erected a hotel on said ground, with the knowledge of the owner, and without objection on his part; but on the contrary it appeared that the owner furnished said lessee with money to aid in erecting the hotel, and the lease was manifestly given with a view to such improvement; these facts, whether the lease was delivered or not, would estop the lessor from denying the delivery. And *semble*, that the fact that the owner some months after the commencement of the building, and when the lessee's responsibility became questionable, took from him a written surrender of the lease, would also estop him from asserting its non-delivery.—*Allen v. Sales*, et al., 28.
2. *Mechanics' liens—Judgment on—Proceedings anterior to, cannot be inquired into collaterally.*—A judgment in a mechanic's lien suit raises the presumption, which cannot be collaterally refuted, that the suit was commenced within ninety days after the filing of the lien; and that the lien was filed in time; and such judgment can be attacked in a collateral proceeding only by showing a want of jurisdiction in the court where the judgment was rendered.—*Id.*
3. *Mechanic's lien—Judgment relates back—Stat., Constr. of.*—Under the statute (*Wagn. Stat.*, 907, § 7,) when a mechanic's lien is consummated by a judgment, that judgment relates back to the commencement of the building, and an intermediate transfer or surrender of the title cannot destroy or affect the lien of the holder.—*Id.*
4. *Mechanic's lien—Attaches, when—Effect of filing demand.*—The right of a mechanic or material man against property subject to a mechanic's lien commences at the time the building is commenced, and the labor or materials are furnished; and for all beneficial purposes the lien commences from that date, and while the claimant cannot enforce his lien against the property until he has complied with the provisions of the statute, still his right to the lien exists from the time that his work and materials go into the building. When the account is filed, the lien relates back to the commencement of the building, and cannot be cut off or divested by any transfer or assignment of the owner after the building is commenced.—*Douglas v. St. L. Zinc Co.*, et al., 388.
5. *Mechanics' liens—Bankrupt act of the United States.*—It was not intended by the United States Bankrupt Law to cut off or destroy liens or vested rights acquired under State laws, but rather to preserve all liens and enforce a distribution of the property of the bankrupt with reference to the rights of all, whether those rights were created by a statutory lien or otherwise. And a person entitled to a mechanic's lien under the law of this state has a right notwithstanding the commencement of proceedings in bankruptcy to perform all acts necessary to the final prosecution and perfection of his lien under the statutes of this State.—*Id.*
6. *Mechanics' Lien—Bankruptcy—Jurisdiction.*—When the property of a bankrupt under the United States Bankrupt Law is subject to a mechanics' lien, the bankrupt court may order the assignee to sell the property and pay off the lien out of the proceeds, or may order the property to be sold subject to the lien, and in that case the courts of the State whose statute gives the lien, would have jurisdiction to ascertain and enforce the lien against the property notwithstanding the proceedings in bankruptcy.—*Id.*

## MECHANIC'S LIEN, continued.

7. *Mechanics' lien—Bond against liens—Liens filed by surety on bond—Estoppel Counter-claim—Injunction.*—A. advanced money to B. to enable B. to improve certain land, taking a deed of trust on the land, and a bond from C., the contractor, with D. as surety, that the buildings to be erected would be delivered to B. free from mechanics' liens. E. afterwards purchased the property and took an assignment of the bond. D. subsequently filed a lien for materials delivered to C. for the builders. *Held*, that D. was not estopped by the bond from filing his lien; that if A. lost any part of his money by reason of such lien being filed, the damage so sustained might be set up as a counter-claim. *Seem*, that if D. was about to enforce a lien, which endangered A's debt, A. might enjoin its collection till his debt was paid.—*Hartman v. Berry, et al.*, 487.

## MINES AND MINING.

1. *Injunction against mining by a trespasser who is insolvent.*—It has long been settled that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted; and more particularly is this true when the trespasser is insolvent.—*Lockwood v. Scott*, 68.
2. *Mining—License—Trespass.*—One engaged in mining under an agreement with the owners, which by its terms was revocable at any time at their option, holds under a mere license, and by continuing work after its revocation becomes a trespasser. (See *Lunsford vs. La Motte Lead Company*, 54 Mo., 426.) —*Lockwood v. Scott*, 68.

MISTAKE, see Agency, 4.

## MORTGAGES AND DEEDS OF TRUST.

1. *Married woman—Mortgage on separate property—Acknowledgment—Relinquishment of dower, etc.*—The certificate of acknowledgment of a married woman to a mortgage given by her on her separate property, is not void by reason of the fact that she is therein made to relinquish her dower. Such clause may be rejected as surplusage.—*Siemers v. Kleeburg*, 196.
  2. *Feme covert—Mortgage of separate estate—Acknowledgment—Unnecessary when.*—*Seem*, that a *feme covert* signs a promissory note, her separate estate will be bound, although her deed of trust given upon such estate to secure the note was unacknowledged.—*Id.*
  3. *Mortgage—Note secured by—Payment of—Subrogation—Remedy against estate of married woman, etc.*—Where a third person, at the instance of a mortgagor, or for his own protection, pays a note secured by the mortgage, he becomes entitled in equity to the benefit of the mortgage; and in such case, a court of equity will subrogate him to all the rights of the creditor. But where the owner of the property mortgaged is no party to the note, and is a stranger to the transaction by which the note was paid, and is a married woman not holding the land in her own separate right, the party so paying the note, can have no claim on the property.—*Wolff v. Walter*, 292.
  4. *Bill in equity to set aside sale of land made during rebellion for non-payment of note.*—During the late rebellion, citizens residing in the rebel states were alien enemies and could not sue in courts of the loyal States, but they might be sued therein by citizens of the latter States. Thus, where, after the President's proclamation of August, 1861, a note having been dishonored, certain land given under deed of trust to secure it was sold to satisfy the debt, a bill in equity will not lie on behalf of the maker to set aside the sale, on the ground that the plaintiff was, when the note matured and the land was sold, within the Confederate lines and cut off from all intercourse with the loyal States: it further appearing, that the plaintiff had voluntarily gone and remained South. The doctrine of *Dean vs. Nelson*, (10 Wall., 158,) has no application to such a case.
- Held* further, that the trustee having absolute power to sell on default, it was immaterial what were the circumstances or disabilities of the maker of the note.

**MORTGAGES AND DEEDS OF TRUST, continued.**

Failure of notice to him, or even his previous death, would not invalidate the sale. The notice required by statute was not intended to apprise the grantor in the deed of the sale of the land.—*DeJarnette v. DeGiverville, et al.* 440.

5. *Note—Deed of trust—Sale under during war—Equity will interpose.*—During the late war, the citizens of the rebel States being alien enemies were subject to the laws of nations, under which one residing in the South would be prohibited from paying a note which fell due in the loyal States during that period. Hence, default in its payment under such circumstances would not authorize the sale of land given under deed of trust to secure it, and equity would interpose to set aside the sale.

The note and deed of trust must be construed as made subject to the implied power of the governments to which the parties belong, to interfere with or suspend it "*flagrante bello.*" *PER NARTON, J., DISSENTING.*—*DeJarnette v. DeGiverville, et al.* 440.

6. *Bills and Notes—Protest—Due diligence—Excuse for failure to protest.*—The question whether the maker of a promissory note had left his place of residence so that a demand of payment could not be made there; or whether he had a place of business in the city where he resided, where such demand could be made, are questions of fact for the jury.—*Bartholow, et al. v. Barnard, et al.* 550.

See Agency, 5, Bills and Notes, 2; Husband and Wife, 3.

**N.**

**NEGLIGENCE.**

1. *Negligence, immediate and proximate cause of injury—Recovery in case of negligence of plaintiff; of both parties.*—No one can recover for an injury of which his own negligence in part or in whole was the immediate and proximate cause. Where the negligence of both parties was the proximate cause, neither can recover.—*Schaabs v. Woodburn Sarven Wheel Co.*, 173.

2. *Negligence—Question for jury, when.*—In many cases where the facts are undisputed, the question of negligence is one of law to be passed upon by the court, but, where they are disputed or admit of different constructions or inferences, the question should be left for the jury.—*Norton v. Ittner, et al.* 351.

See Damages; Railroads, 2.

**NEW TRIAL**, see Practice, civil, New Trial.

**NOTARY PUBLIC**, see Husband and Wife, 6.

**NOTICE.**

1. *Landlord and Tenant—Lessee holding over—Notice to quit, when not necessary.*—A lessee for a year, holding over, but disclaiming his landlord's title, is not entitled to notice to quit.—*Stephens v. Brown*, 23.

See Bills and Notes, 7; Guaranty, 2; Insurance, Fire, 1, 3; Streets, 1.

**O.**

**OFFICERS.**

1. *County Clerk—Resignation of office—Filing of with County Court—Effect—Forwarding of paper to Governor—Action by, etc.*—The Clerk of a County Court tendered his resignation to take effect at a future date. The paper was filed in the office of the court. Afterward and before the date when the resignation was to take effect, the clerk forwarded to the County Court his written withdrawal. But meantime and without his consent and against his express directions, the resignation had been forwarded to the Governor and by him approved, and another person appointed clerk.

*Held*, that under a proper construction of the State Constitution (Art. V, § 8), such resignation was not legal and complete unless sent to the Governor and



## OFFICERS, continued.

accepted by him with the knowledge and consent of the clerk; that the filing of the document with the County Court was a nullity, giving that body no jurisdiction; that the paper was constructively still in possession of the clerk; that in law the office of County Clerk did not become vacant; and that with the sanction of the court, the clerk might at the same term legally withdraw his resignation notwithstanding the new appointment of the Governor.—*State v. Van Buskirk*, 17.

2. *St. Louis, City of—Land Commissioner—Assessments must not exceed benefits.*

—Section 3, Art. VIII, of the Act of 1870, revising the Charter of the City of St. Louis (Sess. Acts, 1870, p. 478), provides that the Land Commissioner's jury shall assess property of owners, adjoining land condemned for street openings, "in proportion that such property may be respectively benefited by the proposed improvement." Under that section, an instruction to the jury that they are bound to find a verdict for the amount of damages although they may be of the opinion that the sums to be assessed against adjoining land-owners therefor, may be in excess of the actual benefits derived by the property, is manifest error. Under such instruction, private property may be taken without just compensation in the way of benefits.—*Tyler v. St. Louis*, 60.

3. *Elections—Official returns—Governor and Secretary of State cannot go behind.*

—In counting votes for a Circuit Judge, neither the Governor nor the Secretary of State have any authority to go behind the returns officially certified to the Secretary.—*State v. Townsley*, 107.

See Elections, 2; Engineer; Execution, 2; Judgment, 1; Revenue, 1.

ORDINANCE, see St. Louis, City of, 3, 6.

OWNER, see Damages, 3.

## P.

## PARTNERSHIP.

1. *Partners—Rights of—Appropriation of partnership property to payment of separate debt of one partner.*—While there is no doubt about the power of one partner to dispose of the property of the firm by *bona fide* sales, yet he cannot appropriate it, without the consent of his co-partner, to the payment of his individual debts, either with or without the knowledge of the creditor that such property belonged to the partnership.—*Ackley, et al. v. Staehlin*, 558.

2. *Partnership—Contracts—Evidence.*—A firm composed of A. and others, under the firm name of A. & Co., had been doing business in another city, and had had transactions with C. doing business in St. Louis. The firm of A. & Co. was dissolved and A. formed a new partnership with B. under the name of A. & B., and succeeded to the business of the old firm. Subsequent to this change, C. sent an order for goods addressed to A. & Co., which was filled by A. & B. and a letter was written to C. by a clerk who had been in the employment of A. & Co., and continued in the employ of A. and B., advising him of the shipment of the goods; this letter was written in the name of A. & Co., and the goods were marked with their initials, and A. & Co. were credited by C. with the value of the goods. Other letters were also written by the same clerk under the name of A. & Co. to other parties, after said dissolution, concerning their business in St. Louis. After the purchase of these goods C. was garnished on an attachment against A. & Co., and paid over their value under the garnishment. On a suit by A. & B. against C. for the price of the goods, *Held*, that it was a question of fact for the jury whether B. had knowledge, at the time, of the manner in which the goods had been shipped, and that if he had such knowledge, he was bound by the letter of the clerk written to C., and that said letter was admissible in evidence; and also, that the other letters were admissible to show that the firm of A. & Co., was still in existence as to parties in St. Louis or assumed to be so with the knowledge of B.—*Ackley et al. v. Winkelmeyer*, 562.

PARTY WALLS, see Land and Land Titles, 13.

PATENT, see Ejectment, 1; Land and Land Titles, 5.

PAYMENT, see Revenue, 1.

POSSESSION, see Bills and Notes, 1, 2; Fraudulent Conveyances, 1, 2; Land and Land Titles, 7; Landlord and Tenant, 3; Limitations, 1.

PRACTICE, CIVIL.

1. *Practice, civil—Correction of entries, nunc pro tunc.*—Courts have a right at a term subsequent to the one at which a judgment is rendered to correct, by an order *nunc pro tunc*, a clerical error or omission in the original entry, and it will be presumed in the absence of contrary evidence that the court exercised proper judgment in making such corrections.—*Allen v. Sales, et al.*, 28.
2. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed to set aside the order granting the appeal, and then grant a new trial.—*Kingman et al. v. Abington, et al.*, 46.
3. *Practice, civil—Continuance—Granting of, left to discretion of court, etc.*—The continuance of a cause rests very much in the sound discretion of the court, and the exercise of such discretion will be presumed to be sound and proper. Unless it plainly appears from the record that the discretion has been unsoundly or oppressively exercised, the Supreme Court ought not to interfere.—*Bartholow, et al. v. Campbell*, 117.
4. *Practice, civil—Continuance, affidavit for—What essential to.*—An affidavit of continuance ought to negative any inference that it is made for vexation or delay, and where the application is grounded on the absence of a witness, it should state at what time deponent expects to be able to procure his testimony.—*Barker v. Patchin*, 241.
5. *Equity—Practice, civil—Motion—Relief.*—Where a motion is made under a statute for a particular remedy therein provided, it is not competent for the court, on that motion, to grant other equitable relief which is not embraced in or relied on in the motion.—*Schneider v. Meyer, et al.*, 475.
6. *Practice, civil—Papers in duplicate—Notice to produce, etc.*—Notice to produce is never required where the instrument to be proved and that produced are duplicate originals, or where the instrument to be proved is itself a notice.—*Barr, et al. v. Armstrong*, 577.
7. *Practice, civil—Instructions.*—Instructions not based on evidence ought not to be given.—*Id.*
8. *Practice, civil—Instruction—May assume facts, when.*—*Semble*, that when testimony is clear and undisputed, an instruction may assume the truth of the matter sworn to.—*Id.*

See Practice, civil, Actions; Eminent Domain; Judgments, 6; Mechanic's Lien, 4.

PRACTICE, CIVIL, APPEAL, see Appeal; Court, St. Louis Circuit, 1.

PRACTICE CIVIL—NEW TRIAL.

1. *Practice, civil—Circuit Court—Appeal set aside—New trial, etc.*—The Circuit Court has the right at the same term at which an appeal is allowed, to set aside the order granting the appeal, and then grant a new trial.—*Kingman, et al. v. Abington, et al.*, 46.
2. *Practice, civil—New trial—Motion for before judge succeeding the one trying cause, etc.*—The action of a judge in overruling a motion for a new trial, etc., on the ground that the case having been heard before his predecessor he was ignorant of the merits, is error. In such state of facts he should have granted a new trial. (*Woolfolk vs. Tate*, 25 Mo., 597.) Generally, in a case of this character costs should be taxed against the party filing the motion.—*Cocker v. Cocker*, 180.
3. *New trial—Motion for—Not necessary, when.*—Generally, a motion for a new trial is necessary in order to bring the matter complained of to the attention of the trial court and save matters of exception which occurred in the progress

**PRACTICE, CIVIL—NEW TRIAL, continued.**

of the trial. But when the whole case is decided upon demurrer to the petition, and judgment is rendered thereon, or where the case is dismissed upon motion, and the motion and exceptions are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record, it is not necessary or usual to file a motion for a new trial.—*O'Connor v. Koch*, 253.

4. *Practice, civil—New trials—Newly discovered evidence—Diligence.*—It is a rule of almost universal application that a new trial will not be granted on the ground of newly discovered evidence, where the new facts are to be proved by a witness who has already testified in the cause, and a new trial should not be granted on such ground, if it appears that the failure to discover it is the result of lack of due diligence.—*Cook v. St. L. & K. R. Co.*, 380.

5. *Practice, civil—New trials—Granting of, matter of discretion with the trial-court.*—The granting of new trials, because of newly discovered evidence, rests for the most part with the trial-court; and any doubt as to whether its discretion has been soundly exercised is to be resolved in favor of its ruling.—*Id.*  
See Execution, 1.

**PRACTICE, CIVIL—PARTIES.**

1. *Administration—Practice, civil—Parties—Action on administrator's bond—Distributees may sue jointly, before order of distribution.*—Before an order of distribution is made, those entitled to distribution have a common interest in the fund, and in an action against the sureties on the administrator's bond they may properly be joined as plaintiffs to prevent a multiplicity of suits.—*Kelly v. Thornton, et al.*, 325.

See Administration, 5.

**PRACTICE, CIVIL—PLEADING.**

1. *Practice, civil—Pleading—Allegations taken as true, when, etc., and as to whom.*—Under the Practice Act (Wagn. Stat., p. 1019, § 36) facts not controverted in a previous pleading are to be taken as true in favor of the party pleading them, not as a matter to be submitted to and found by the jury; but they are taken as true as a matter of law to be declared by the court. But the failure of plaintiff to reply to a defense set up in the separate answer of one defendant is no admission of such defense as to the other defendants not setting it up.—*Bartholow v. Campbell*, 117.
2. *Husband and wife—Wife may answer separately, when.*—Under the statute (Wagn. Stat., 1001, § 8) a married woman may answer separately although her husband is co-defendant.—*Seimers v. Kleeberg*, 196.
3. *Practice, civil—Pleading—Distinctness and brevity in—Motion to amend pleading for uncertainty—Motion stricken out on same ground.*—A motion to amend a petition on the general allegation that the pleadings are irrelevant or redundant is not sufficient. The motion should, with at least a reasonable degree of certainty, set forth the particulars wherein the pleadings are uncertain. Good practice not only requires the petition to have certainty and brevity, but it also requires some certainty and distinctness to be observed by the defendant.—*O'Connor v. Koch*, 253.

See Practice, civil, New Trial, 2.

**PRACTICE, CIVIL—TRIALS.**

1. *Practice, civil—Verdict—General finding for defendant sufficient, unless in case of counter-claims.*—It is not necessary to find separately for defendant on each count. A general finding for defendant embraces all the issues and is in effect the same as finding each issue for him. This rule may not apply where the answer contains distinct and separate counter-claims.—*Schaaba v. Woodburn Sarven Wheel Co.*, 173.
2. *New trial—Motion for—Not necessary when.*—Generally a motion for a new trial is necessary in order to bring the matter complained of to the attention of the trial court and save matters of exception which occurred in the progress of the trial. But when the whole case is decided upon demurrer to the petition, and judgment is rendered thereon, or where the case is dismissed upon motion, and the motion and exception are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record, it is not necessary or usual to file a motion for a new trial.—*O'Connor v. Koch*, 253.

## PRACTICE, CIVIL—TRIALS, continued.

3. *Practice, civil—Jury—Verdict—Supreme Court.*—In civil law cases the Supreme Court will not disturb the verdict of the jury on questions of conflicting testimony.—*Estel, et al. v. St. L. & S. E. R. R. Co.*, 282.
4. *Practice, civil—Instructions, should cover the whole case.*—Instructions should be founded upon all the evidence and take in the whole case; but a judgment will not be reversed because one is technically erroneous, provided the instructions given, taken together, fairly present the law on both sides of the case and in a manner not likely to mislead.—*Henschen v. O'Bannon*, 289.
5. *Practice, civil—Instructions.*—The giving of inconsistent instructions is error.—*Id.*
6. *Instructions should present the whole case.*—If an instruction does not cover the whole case, the court may modify it so as to present the views of both parties under the pleadings and the evidence.—*O'Neil, et al. v. Capelle*, 296.
7. *Practice, civil—Trials—Re-opening of case after it has been submitted—Surprise.*—It is not error to refuse to open a case on the application of a party, after it has been submitted on the evidence. The granting of such an application would be a surprise to the other party.—*Van Studdiford, Trustee, v. Hazlett*, 322.
8. *Practice, civil—Jury—Evidence.*—In civil law cases, the jury must determine the weight of evidence.—*Burham v. St. L. & I. M. R. R.* 338.
9. *Wills—Contest, touching—Right to open and close.*—In a statutory proceeding to contest a will (*Wagn. Stat. 1368, § 29*) the *onus probandi* is upon the defendant, and he is therefore entitled to open and close. But the right to open and close generally rests very much in the sound discretion of the court; and an error upon this point will not warrant a reversal, unless defendant is shown to have suffered injury in consequence.—*Harvey, et al. v. Heirs of Sullens*, 372.
10. *Practice, civil—Trials—References—Exceptions to report.*—Unless exceptions to a referee's report are allowed, the report should be confirmed and judgment rendered thereon in the same manner and with like effect as upon a special verdict. The case should not be set down for a re-trial by the court.—*Reinbecke v. Michael*, 386.
11. *Practice, civil—Trials—Testimony—Objections to—Grounds must be specifically stated, in legal or equitable actions.*—The rule requiring the grounds of objections to testimony to be specifically stated, applies alike to legal and equitable actions; and objections, the grounds of which are not specifically stated, are properly disregarded by the court.—*Primm, et al. v. Raboteau*, 407.
12. *Practice, civil—Trials—Instructions—Multiplicity of—Ground of refusal.*—Too great a multiplicity of instructions would only tend to confuse a jury, and of itself would be a good ground for their refusal.—*Crawshaw v. Sumner*, 517.
13. *Practice, civil—Trials—Instructions stating abstract principles not adapted to the facts, improper.*—Instructions should always be framed with reference to the issues and evidence in the cause. It is not error in a court to refuse to give an instruction containing an abstract principle of law, if, from the facts of the case, the instruction is not applicable or would tend to mislead the jury.—*Longuemare v. Busby*, 540.
14. *Practice, civil—Trials—Instructions should apply to theories of both sides—Fraud—Should not be ignored by instructions.*—An instruction which ignores facts which would make a contract fraudulent or ignores the theory of either side based upon such facts is erroneous.—*Id.*
15. *Practice, civil—Trials—Evidence—Instructions.*—Where testimony is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction.—*St. Vrain v. C. B. Levee Co.* 590.
16. *Practice, civil—Continuance—Granting of, left to discretion of court, etc.*—The continuance of a cause rests very much in the sound discretion of the court, and the exercise of such discretion will be presumed to be sound and proper. Unless it plainly appears from the record that the discretion has been unsoundly or oppressively exercised, the Supreme Court ought not to interfere.—*Bartholow, et al. v. Campbell*, 117.

See Evidence, 2; Practice, criminal, 2; Referee.

## PRACTICE, CRIMINAL.

1. *Practice, criminal—Indictment for burglary in first degree—Conviction of, in second degree and of larceny.*—Where the language of an indictment and the facts proved constituted a case of burglary in the first degree, (Wagn. Stat., 454,) a verdict convicting defendant of burglary in the second degree is error, and will be set aside on appeal to the supreme court.  
But in such case defendant may be found guilty of larceny.—State v. Alexander, 131.

2. *Practice, criminal—Appeal—Death of defendant—Effect of.*—Where pending appeal taken upon a conviction for misdemeanor defendant dies, the suit cannot be revived against his administrator, but must abate and the appeal will be dismissed. (Wagn. Stat., p. 1114, § 12.)—State v. Perrine, Adm'r, 602.

See Criminal Law, 1.

## PRACTICE—SUPREME COURT.

1. *Practice, Supreme Court—Bill of exceptions—Record.*—Nothing is brought to the Supreme Court without a bill of exceptions, except the record proper.—State v. Miller, 125.

2. *Practice, Supreme Court—Leading question—Decision of trial court, no ground for reversal.*—The question whether a leading question is permissible in direct examination is one to be decided by the trial court in its sound discretion, and its decision in this regard is not assignable for error in the Supreme Court.—St. L. & I. M. R. R. v. Silvers, 265.

3. *Practice, civil—Jury—Verdict—Supreme Court.*—In civil law cases the Supreme Court will not disturb the verdict of the jury on questions of conflicting testimony.—Estel, et al. v. St. L. & S. E. R. R. Co., 282.

4. *Supreme Court—What points examined by.*—The Supreme Court will only pass upon such points as were presented in the court below.—Wolff v. Walter, 292.

5. *Practice, civil—Conflict of evidence.*—In civil law cases, questions of conflicting evidence will not be reviewed by the Supreme Court.—St. Louis to use of Bruennell v. Bressler, 350.

6. *Practice, Supreme Court—Evidence, not weighed.*—The Supreme Court will not weigh evidence in a cause to see if it was properly considered by the jury; although, if it were clearly shown that there was absolutely no evidence to uphold a verdict so as to plainly indicate that the verdict was the result of mistake, prejudice or corruption, the Supreme Court would not hesitate to reverse the judgment rendered on such a verdict. To induce such action the case must be a clear one.—Doering v. Saum, et al., 479.

7. *Practice, Supreme Court—Evidence will not be weighed in the Supreme Court.*—Where there is evidence tending to prove both sides of the case, it will not be weighed by the Supreme Court.—Longuemare v. Busby, 540.

8. *Practice—Supreme Court—Verdict contrary to evidence.*—While the Supreme Court, in law cases, will not generally weigh evidence or disturb a verdict where there is conflicting testimony, yet where the verdict is manifestly against the evidence and instructions, the Supreme Court will interfere and reverse the judgment.—Ackley, et al. v. Staehlin, 558.

See Damages, 1; Practice, civil, trials, 3; Quo Warranto, 3; Referee, 3.

PRINCIPAL AND AGENT, see Agent.

PRINCIPAL AND SURETY, see Surety.

PRIVITY, see Land and Land Titles, 11.

PROBATE, see Administration.

PROTEST, see Bills and Notes, 11.

## Q.

QUANTUM MERUIT, see Contracts, 5.

## QUO WARRANTO.

1. *Quo warranto*—*Change of venue*—*Application for, to what court addressed, etc.*—Where in *quo warranto* the issues of fact are ordered by the Supreme Court to be tried in a specified county, application for change of venue made to the court of that county is properly overruled. Any objections to the venue should in such case be addressed to the Supreme Court.

The general law touching change of venue has no application to such a case.—*State v. Townsley*, 107.

2. *Quo warranto*—*Circuit Judge*—*Returns of election, correctness of*—*Issues touching.*—In *quo warranto* on the relation of the Attorney General to test the title of a Circuit judge to his office, defendant averred generally that he was duly elected. Plaintiff's replication set out specifically the returns from the counties comprising the circuit, and charged that the returns from a certain county had been excluded from the count. Defendant's rejoinder was a general denial of the averments of the replication—nothing more; *Held*, that the correctness of the returns was not put in issue by the pleadings, and could not be inquired into.

In *quo warranto*, parties cannot go behind the official returns, unless the specific objections thereto be stated in the pleadings; there must be, *e. g.*, a specification of the number and names of the voters alleged to be illegal; general averments in reference thereto are insufficient.—*Id.*

3. *Quo warranto*—*Supreme Court*—*Common law.*—In the State of Missouri, pleadings in *quo warranto*, in the absence of any statute, are governed by the common law.—*Id.*

4. *Quo warranto*—*Defendant's title to be tested under*—*Plaintiff's right determined incidentally, when.*—The primary and fundamental question, in a proceeding in *quo warranto*, is whether the defendant is legally entitled to hold the office, and not as to the rights of any other person who may claim it. Where the information is on the relation of one who himself claims to have been elected, his rights may incidentally have to be determined, but not where the proceeding is instituted by the State.—*Id.*

## R.

## RAILROADS.

1. *County railroad bonds*—*Andrew county*—*Interest on bonds, what lawful.*—In January, 1860, by the general law then in force, the county had power to issue bonds for the Platte County Railroad Company, bearing interest at the rate of ten per cent. These bonds were not governed by § 33 of the statute touching Railroads (R. C. 1855, p. 429), limiting the interest to seven per cent. That section referred to special cases contemplated by § 31 of same act. The bonds of Andrew County were issued under different circumstances and a distinct and independent grant of power; and as no limitation was therein imposed as to the interest, it was competent to fix any rate of interest not prohibited by law.—*Beattie v. Andrew County*, 42.

2. *Railroads*—*Damages*—*Negligence, contributory.*—Although one injured by a railroad collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet if the accident was directly caused by negligence of the company, the latter will be liable.—*Burham v. St. L. & I. M. R. R.*, 338.

RATIFICATION, see Infants, 2.

REBELLION, see Bills and Notes, 9.

RECORD, see Practice, Sup. Ct., 1.



## REFEREE.

1. *Reference in invitum—Jury—Constitution.*—In an action at law involving the examination of a long account, the court may properly refer the case on the motion of one and against the objection of the other party (See Wagn. Stat., 1041, § 18.)—This provision is not unconstitutional as depriving the objecting party of the right to trial by jury (Const. Art. I, § 17). Such power of reference had been authorized and exercised for twenty years prior to the present constitution. And the object of the framers of that instrument must have been to preserve the right of jury trial as it then existed and has been practiced upon, and not to establish a new rule on that subject.—*Edwardson v. Garnhart*, 81.
2. *Referee—Statutory oath—Report—Recital of touching.*—The recital in a referee's report that he had been "duly qualified" is at least *prima facie* evidence that he had been sworn as the statute required; particularly in a case where the parties had proceeded without objection to hear the whole case before the referee.—*Id.*
3. *Referee—Report—Objections to raised first in Supreme Court not heard.*—The objection that a referee failed to find separately on each count of the petition, when not made to the report or raised by a motion for a new trial will not be considered by this court.—*Id.*
4. *Practice, civil—Trials—References—Exceptions to report.*—Unless exceptions to a referee's report are allowed, the report should be confirmed and judgment rendered thereon in the same manner and with like effect as upon a special verdict. The case should not be set down for a re-trial by the court.—*Reinbecke v. Michael*, 386.

## REPLEVIN.

1. *Replevin vs. Constable's Adm'r—Competency of plaintiff as witness—Const. stat.—Surplus fund—Creditors.*—In replevin by a third party against a constable for goods seized under execution, where the constable died after suit was commenced and his administrator was substituted as a party, the plaintiff then ceased to be a competent witness under the statute.—(Wagn. Stat. 1371-2, § 1.)
- In such proceeding, judgment being given in behalf of defendant for the value of the property, any surplus after satisfying the execution debt, may be seized by the other creditors. Plaintiff in the replevin cannot hold it.—*Blobaum v. Gambs, Adm'r*, 183.

See Landlord and Tenant, 6.

## RES ADJUDICATA.

1. *Res adjudicata—Practice, civil—Tenants in common—Privity.*—Under the above detailed circumstances, the personal participation of a party in the previous litigation is wholly immaterial, provided his title hangs by the same thread, and depends on the same facts, as that of his co-claimants.—*Primm v. Raboteau*, 407.

RESIGNATION, see Officers, 1.

## REVENUE.

1. *Collector—Check received for taxes, when amounts to payment.*—Where a tax-payer has funds in bank sufficient to pay his taxes and the collector receives his check for the amount, and fails to present the check in due time at the bank and the institution afterwards fails, the collector must bear the loss. And if after receipt of the check, the collector returns the taxes delinquent, and the tax-payer is compelled to pay them with another appropriation of money, the collector becomes liable to him for the amount of the check.—*Chouteau v. Rowse*, 65.
2. *Special tax-bills—Personal and general judgment on.*—In a suit on a special tax-bill, the rendition of a personal or general judgment against defendant is error.—*Strassheim v. Jerman*, 105.

## REVENUE, continued.

3. *Insurance, life—Capital Stock—Taxation, what property subject to.*—Section 40 of the act touching life insurance, (Wagn. Stat. 752) provides that the payment of certain fees by the respective companies, shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid up capital stock the same as other property in the county, for county and municipal purposes." *Held*, that this provision, properly construed, did not prevent the taxation of other property owned by the companies, over and above the par value of their capital stock. Such is not double taxation. But the non-taxation of such property would amount to an exemption, in violation of the State Constitution. (See *Life Association of America v. Board of Assessors*, etc., 49 Mo., 512.)—*St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County*, et al., 503.
4. *Revenue—Double taxation not necessarily void.*—In levying taxes on property, the same value is sometimes unavoidably taxed twice; but this fact does not, of itself, render the tax illegal and void.—*St. L. M. L. Ins. Co. v. Bd. of Ass. of St. L. County*, et al., 503.  
See Special Taxes.

## S.

## SAINT LOUIS, CITY OF.

1. *St. Louis, City of—Land Commissioners—Assessments must not exceed benefits.*—Section 3, Art. VIII, of the Act of 1870, revising the Charter of the City of St. Louis (Sess. Acts, 1870, p. 478), provides that the Land commissioner's jury shall assess owners, of property adjoining land condemned for street openings, in proportion that such property may be respectively benefited by the proposed improvement." Under that section, an instruction to the jury that they are bound to find a verdict for the amount of damages, although they may be of the opinion that the sums to be assessed against adjoining land owners therefor, may be in excess of the actual benefits derived by the property is manifest error. Under such instruction, private property may be taken without just compensation in the way of benefits.—*Tyler v. St. Louis*, 60.
2. *St. Louis—Street improvements—Unexecuted contracts for—Ordinance validating—Acceptance of, etc., etc.*—Under § 9 of the Act of March, 1867, amendatory of the charter of St. Louis, (Sess. Acts 1867, p. 73,) it was competent for the city, where a contract entered into under a certain ordinance remained unexecuted, to adopt and approve such contract by an amendatory ordinance on condition that the contractors would file their written acceptance of the latter ordinance. Such adoption and approval were within the meaning of the above section of the charter a "providing by ordinance" for the performance of the work which had been contracted for.—*Strassheim v. Jerman*, 105.
3. *Street Improvements—Ordinance touching—Completion of—Specification as to time of.*—An ordinance authorizing a City Engineer to make certain street improvements is not invalidated by reason of its failure to specify the time within which the work shall be done.—*Id.*
4. *St. Louis—Sewer—Route of in district—Need not be determined by ordinance.*—Under § 12, Art. VIII. of the charter of the City of St. Louis, of 1870, the City Council must establish the sewer districts by ordinance. But it need not pass another and special ordinance to determine the particular route, or dimensions or material or laterals of the sewer within the district. These details may be determined by ordinance, or be entrusted to the engineer to be regulated by contract.—*State, ex rel., v. St. Louis*, 277.
5. *St. Louis—Sewer—Plans and profiles—To be submitted to the City Council, when.*—The plans, profiles and estimates mentioned in § 17, Art. VIII of the St. Louis charter of 1870, are required to be prepared and submitted to the City Council, only in cases where the work is done by the city, and paid for by appropriations out of the city treasury.—*Id.*

## SAINT LOUIS, CITY OF, continued.

6. *Street improvement—Ordinance in relation to—Specification as to time when work is to be done.*—An ordinance authorizing the city engineer of the city of St. Louis to improve certain streets is not rendered invalid by reason of its failure to specify the time within which the work shall be done.—*Carlin v. Cavender*, 286.

See Corporations, 1.

SALES, see Frauds, statute of, 2; Sheriff's Sales.

SATISFACTION, see Judgment, 8.

## SCHOOLS AND SCHOOL LANDS.

1. *Township organization—Webster Groves School District—Power to extend limits of—Constr. Stat.*—The town of Webster Groves having been laid out and a plat thereof having been filed in the proper recorder's office (§ 1, Act March 17th, 1868; Adj. Sess. Acts, 1868, p. 164), under § 1 of the Act of March 23rd, 1868, *Id.*, p. 164, the Webster Groves district had power to change and extend its limits, although the town was not incorporated. Notwithstanding the use of the word "corporation" in the last mentioned statute, the design of the legislature was not to confine the operation of its provisions to towns, etc., which had been incorporated.—*State, ex rel. v. Heath*, 231.

SEPARATE E-STATE, see Husband and Wife, 1, 2, 5, 10; Trusts and Trustee, 2.

SETTLEMENT, see Account Stated.

SEWERS, see Corporations, 1; St. Louis, City of, 4, 5.

SHERIFF, see Execution, 3.

## SHERIFF'S SALE.

1. *Sheriff's deed—Different judgments—One deed under—Consolidation of descriptions.*—A sheriff upon the sale of a certain parcel of land, against the owner of which three judgments and executions were outstanding, made a deed which united in one description the different judgments and executions, and the gross amount recovered. But the dates of the judgments and executions were correctly stated, and the names of all the parties were correctly given in the aggregate. The deed was substantially correct, and the recitals although somewhat ambiguous could mislead no one. *Held*, that the deed sufficiently conformed to the statute.—*Allen v. Sales, et al.*, 28.
2. *Administration—Real estate, sales of—Deeds, description in—Sheriff's sales.*—A sale of real estate by an administrator is *in invitum* as to the heirs, who are the real owners. He exercises a statutory power under the orders of the Probate Court, and the principles which apply to sheriffs' sales as to the description of the property to be sold, apply to administrators' sales.—*Jones, et al. v. Carter*, 403.

## SPECIAL TAXES.

1. *Engineer—Special tax bill—Substitution of name on bill.*—A special tax bill in which the name of the property owner originally inserted by the city engineer is stricken out and another added by the assignee instead, is inadmissible in evidence; and this is the case even although in suit on the bill against the party whose name is substituted, he admits that he owns the property mentioned in the bill.—*Keffenstein v. Knox*, 187.
2. *Engineer—Special tax bill—Judgment in case of, should be special against property.*—In suit on a special tax bill for street improvements no general or personal judgment against the defendant can be rendered. The judgment should be a special one against the property.—*Carlin v. Cavender*, 286.
3. *Special tax bills—Judgment on, should be special.*—Judgments in suits upon special tax bills should be special—against the property charged with the lien—and not a personal or general one.—*St. Louis to use of Bruennell v. Bressler*, 350.

See Revenue; Judgment, 3, 5.

## STATUTE, CONSTRUCTION OF.

1. *Injunction—Ferry privilege—Conflicting charters of Missouri & Kansas Legislature.*—In bill to enjoin defendant from ferrying the Missouri River between this State and Kansas, within a certain territory to which plaintiff claimed the exclusive franchise, solely by virtue of the Act passed by this State, Nov. 17th, 1855, demurrer held well taken. *Non Constat*, but that under an Act passed by the Legislature of Kansas, defendant had a similar privilege of ferrying from the opposite shore.—*Challiss v. Davis*, 25.

See ADMINISTRATION, 2, (Wagn. Stat. 85, §§ 7, 8, 10); 9 (Wagn. Stat. 1368, § 29); Wagn. Stat. 72, § 13); 11 (Wagn. Stat. 72, § 13).

ATTACHMENT, 5, (Wagn. Stat. 189, § 42).

BONDS, ANDREW COUNTY, 1, (R. C. 1855, 429, §§ 31, 33).

CORPORATIONS, 2, (Wagn. Stat. 752, § 40).

CRIMINAL LAW, 1, (Wagn. Stat. 500, § 8).

EMINENT DOMAIN, 1, (Sess. Acts, 1849, p. 593).

EXECUTION, 2, (Wagn. Stat. 1372-3, § 1).

FRAUDULENT CONVEYANCES, 1, 2, (Wagn. Stat. 281, § 10).

HUSBAND AND WIFE, 4, (Wagn. Stat. 1001, § 8); 6 (Adj. Sess. Acts, 1863-4, p. 27); 11 (Wagn. Stat. 1000, § 3).

INJUNCTION, 1.

INSURANCE, LIFE, 1, (Wagn. Stat. 752, § 40); 2 (Wagn. Stat. 1000, § 3).

LANDLORD AND TENANT, 7, (Wagn. Stat. 880, § 18; *Id.* 881-2, § 26).

MACON COUNTY, 1, (Sess. Acts 1863, 86, § 15).

MECHANIC'S LIEN, 3, (Wagn. Stat. 907, § 7).

OFFICERS, 2, (Sess. Acts, 1870, p. 478, § 3).

PRACTICE, CIVIL, PLEADINGS, 1, (Wagn. Stat. 1019, § 36); 2 (Wagn. Stat. 1001, § 8).

PRACTICE, CIVIL—TRIALS, 9 (Wagn. Stat. 1368, 29).

PRACTICE, CRIMINAL, 1, (Wagn. Stat., 454, § 10), 2 (Wagn. Stat. 1114, § 12).

RAILROADS, 1, (R. C. 1855, 429, §§ 31, 33).

REFEREE, 1, (Wagn. Stat. 1041, § 18).

REPLEVIN, 1, (Wagn. Stat. 1372-3, § 1).

REVENUE, 3, (Wagn. Stat. 752, § 40).

ST. LOUIS, CITY OF, 1, (Sess. Acts, 1870, p. 478, § 3); 2 (Sess. Acts, 1867, p. 73, § 9); 4 (Sess. Acts, 1870, p. 480, § 12); 5 (Sess. Acts 1870, pp. 481-2, § 17).

SCHOOL AND SCHOOL LANDS, 1, (Adj. Sess. Acts, 1868, p. 164, § 1; [Act approved March 17]; *Id.* § 1.) [Act approved March 28].

SURETIES, 3, (Wagn. Stat. 76, §§ 39, 41).

TRADE-MARKS, 1, (Sess. Acts 1870, p. 72).

WILLS, 2, 4, (Wagn. Stat. 1368, § 29); 4 (Wagn. Stat. 72, § 13); 6 (Wagn. Stat. 72, §§ 6, 13).

STOCK, see Insurance, Life, 1.

## STREETS.

1. *Damages—Street gutter out of repair—Injuries to team in crossing—Notice to authorities of state of street, etc.*—Where a street gutter was washed away and a mule team which was compelled to cross received damage in consequence, and the evidence showed that the street had been in that condition for two months held, that the city was liable, although not notified that the street was out of repair.—*Market v. St. Louis*, 189.

See St. Louis, City of, 1, 2, 3, 6; Officers, 2.

## SURETIES.

1. *Administrator's bond—Sureties—Distributees may maintain action before final settlement.*—Where the administrator has failed to distribute funds in his hands according to law and has been removed, where there are no debts due by the estate persons entitled to distribution may bring suit on the administrator's bond without the appointment of an administrator *de bonis non* and before a final settlement.—*Kelly v. Thornton, et al.* 325.



## SURETIES, continued.

2. *Justices' courts—Appeal—Sureties—Non-suit.*—Where defendant appealed from the judgment of a justice, and in the Circuit Court plaintiff took a voluntary non-suit, which was afterwards set aside without the knowledge or consent of the sureties on the appeal bond, and plaintiff had judgment against defendant and his sureties. *Held*, that the sureties were bound by the judgment.—*Bailey v. Rosenthal*, 385.
3. *Administration—Bond—Sureties—Additional—Release of former.*—The security contemplated by the 41st section of the Administration Law, is additional to that previously given, and does not have the effect of releasing the former sureties. The 39th section applies to an entirely different case, and does not apply to that contemplated by the 41st section. (*State, ex rel., Glenn vs. Wrights*, Adm'r, 53 Mo., 479, affirmed.)—*Haskell v. Farrar, et al.*, 497.—  
See *Estoppe* 5.

SURPRISE, see Practice, civil, Trial, 7.

## T.

TAX, see Macoupin County; Special Taxes; Revenue.

TENANT IN COMMON, See Land and Land Titles, 11.

TITLES, see Land and Land Titles.

TOWNSHIP ORGANIZATION, see Schools and School Lands.

## TRADE MARKS.

1. *Trade marks—Act of 1870—Meant to protect foreign as well as domestic trade marks.*—The act to protect merchants, etc., against counterfeit trade marks, approved February 22nd 1870, (Adj. Sess. Acts 1870,) was designed to protect foreign as well as domestic trade marks, and may be invoked by citizens of other States and countries.—*State v. Gibbs*, 133.

TRESPASS, See Mines and Mining, 2.

## TRUSTS AND TRUSTEES.

1. *Garnishment—Trust property not subject to.*—The statute touching garnishment is essentially legal and not equitable in its nature and procedure; and the rights, credits and effects in the hands of the garnishee which are subject to attachment are such as are not encumbered with trusts, and such as may be delivered over, or paid to the officer under the direction of the court, free from the incumbrances of a trust.

Where a conveyance in trust is made in fraud of creditors, a different rule prevails, for the instrument being void, the property is subject to attachment under simple law process.—*Lackland v. Garesche*, 267.

2. *Trusts and trustees—Separate estate of married woman—Power of disposal and appointment—Failure to exercise—Rents and profits, etc.*—By the terms of a deed for the sole and separate use of a married woman, the trustee covenanted, \* \* \* upon the death of her husband to convey and dispose of the property and all proceeds thereof in such manner and to such persons as she might by her will or other writing appoint, and in default of such appointment to convey the premises to the children when they should become of age. *Held*, that the deed created a springing contingent trust in favor of the children, which might be defeated by a disposition of the property by her during her life, or by an appointment to take effect after her death. But where no appointment was made during her life, the trustee, and not her administrator, was the person then authorized to hold the title and collect the rents till the children became of age, and afterward to pay over to them their respective shares.—*Straat, Adm'r v. Uhrig, et al.*, 482.
3. *Limitations, statute of—Trusts, express—Denial of trust.*—In express technical trusts, the statute of limitations does not begin to run until the trust is denied by the trustee; (*Smith vs. Ricords*, 52 Mo., 581, affirmed) but the *cestui que trust*, in case of such denial, is limited to the period allowed for the recovery of legal estates at law.—*Ricords, Admx. v. Watkins*, 553.

TRUSTS AND TRUSTEES, continued.

4. *Limitations, statute of—Implied trusts—Right of action.*—In implied trusts the statute of limitations begins to run as soon as the facts are brought to the knowledge of the *cestui que trust*, so that he can take steps to enforce the trust. (Smith v. Ricords, 52 Mo., 581, affirmed.)—Id.
5. *Limitations, statute of—Trusts, implied—Express.*—It is not impossible that an express continuing trust, against which the statute of limitations would not run, could be shown by evidence independent of the writing conveying the property to which the trust is attached; and that it thus might be shown by independent testimony, that the possession or conduct of the trustee was consistent with, and not adverse to, the claim or right set up by the *cestui que trust*.—PER VORIES AND NAPTON, J. J., DISSENTING.—Id.

See Bills and notes, 2, 9, 10; Mortgages and Deeds of Trust.

V.

VENDOR, see Land and Land Titles, 6.

VENUE, CHANGE OF.

1. *Quo warranto—Change of venue—Application for, to what court addressed, etc.*—Where in *quo warranto* the issues of fact are ordered by the Supreme Court to be tried in a specified county, application for a change of venue made to the court of that county is properly overruled. Any objections to the venue should in such case be addressed to the Supreme Court.

The general law touching change of venue has no application to such a case.—State v. Townsley, 107.

VERDICT, see Practice, civil, trial, 1; Practice, Supreme Court, 3, 8.

W

WAIVER, see Contracts, 1, 6.

WEBSTER GROVES SCHOOL DISTRICT, see Schools and School Lands, 1.

WILLS.

1. *Wills—Extra-territorial operations of—Responsibility of executor.*—So far as realty is concerned, a will has no extra-territorial force, and the executor cannot sue for, or in anywise intermeddle with, property of his testator, real or personal, in another State, unless the will be there proven, or the laws of such States, dispensing with the probate anew, confer the requisite jurisdiction; and hence, where no such provisions prevail, he cannot be held liable on his bond as executor, for his acts done in another State. Whether he might not be chargeable as trustee for misapplication of funds received in another State, not passed on by the court.—Cabanne, et al. v. Skinker, Ex'r of Forsyth, et al., 357.
2. *Wills—Contest touching—Right to open and close.*—In a statutory proceeding to contest a will (Wagn. Stat. 1368, § 29) the *onus probandi* is upon the defendant, and he is therefore entitled to open and close. But the right to open and close generally rests very much in the sound discretion of the court; and an error upon this point will not warrant a reversal, unless defendant is shown to have suffered injury in consequence.—Harvey, et al. v. Heirs of Sullens, 372.
3. *Wills—Capacity necessary to render testator competent.*—To render a testator competent to make his will, the law does not require any particular degree of understanding. He is simply required to be of sound mind to manage his own affairs, and to know intelligently what disposition he is making of them.—Id.
4. *Wills—Contest, touching—Administrator—Functions suspended—Appointment of administrator pendente lite—Construction of statute.*—Where proceedings are commenced in the Circuit Court under the statute (Wagn. Stat., 1368 § 29) to contest the validity of a will, the Probate Court is authorized by virtue of § 13, of the Administration Act. (Wagn. Stat., p. 72) to suspend the functions of the executor or administrator, and to appoint a temporary administrator, *pendente lite*. The latter section was enacted mainly, if not solely, in view of proceedings authorized by the statute touching wills.



**WILLS, continued.**

This authority to suspend and supersede during the contest applies not merely to the case of an executor named in the will, but is broad enough to reach that of an administrator with the will annexed, who derives his power solely from appointment by the Probate Court.—*Lamb, Adm'r v. Helm, Adm'r*, 420.

5. *Wills—Probate of—Contest touching proceedings in Circuit Court—Onus probandi.*—When a contest is commenced in the Circuit Court under our statute concerning wills, either to establish a will which has been rejected by the Probate Court, or to contest the validity of a will which has been allowed and probated in the Probate Court, in either case the party who relies on, or asserts the validity of the will must prove it up in the same manner, and to the same extent, as if no action had been taken by the Probate Court.—*Id.*

6. *Wills—Contest over—Appointment of administrator pending—Wf. has no priority under § 6 of Administration law—Const. statute.*—Section 6 of the administration law (Wagn. Stat., p. 72,) does not give preference to the wife over others to be selected under § 13 of same act, as special administrators pending contest over the will of the deceased husband. Section 6 refers to the appointment of general administrators, who are to administer and distribute the estate, and has no reference to special administrators appointed to preserve the estate under order of court.—*Id.*

**WITNESSES, see Evidence.**

